

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 DISTRICT OF VERMONT

4 Misty Blanchette Porter)
5)
6 v.) Case No. 2:17-cv-194
7)
8 Dartmouth-Hitchcock)
Medical Center, et al.)
9 _____)

10 RE: Day 9 of Jury Trial

11 DATE: April 3, 2025

12 LOCATION: Burlington, Vermont

13 BEFORE: Honorable Kevin J. Doyle
14 Magistrate Judge

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1 THE COURT: Okay. Good morning. Couple of issues to
2 take up, I hear. Ms. Nunan?

3 ATTORNEY NUNAN: Hi there. Good morning, Your Honor.

4 THE COURT: Good morning.

5 ATTORNEY NUNAN: There were some documents that
6 defendants have identified as incomplete, and we've been trying
7 to locate the native documents. So the nature of the
8 incomplete is there's an email with an Excel attachment, and
9 the attachments, if you go up and hit the review, there are
10 comments, apparently, that are within the, that are attached to
11 the Excel spreadsheet. So, during the depositions, it was not
12 clear to me that there were comments on there, and nothing came
13 up about that, but I respect the fact that they are saying
14 these documents are not complete without them.

15 I have spent some time, and I can't find the natives. So
16 I can't go in and just reprint them, and they were kind enough
17 to locate two of the exhibits with the Excel files, but there's
18 about seven of them. And so I propose that -- well, I will let
19 you decide how to handle it. I would like to use all of them
20 today, and, to the extent it takes us a little bit longer to
21 get the comments on the Excel sheet, I propose that we submit
22 that at a later date.

23 THE COURT: So these are all related to exhibits to
24 be admitted today, potentially, not already admitted exhibits?

25 ATTORNEY NUNAN: Yes, that's exactly right.

1 THE COURT: What is the defense's position?

2 ATTORNEY SCHROEDER: Good morning, Your Honor.

3 THE COURT: Good morning.

4 ATTORNEY SCHROEDER: Here's our position. There are,
5 there were seven documents, seven exhibits we identified on
6 March 20th, which is only two weeks ago, but it seems much
7 further. We identified in a very long email to plaintiff's
8 counsel the issues with a variety of their exhibits. We
9 pointed out that the Excel does not contain comments from our,
10 from the native version. We've produced everything, all the
11 metadata, et cetera. I think it was 27,000, to 28,000 pages in
12 this case. We identified on March 20th the errors.

13 Despite under no obligation to do so out of professional
14 courtesy, Ms. Martinez, last night, actually identified some
15 additional documents for two of the exhibits, and we have given
16 them to plaintiff's counsel, but I'm not -- I'm going to object
17 strenuously, in the words of Demi Moore. The fact that we're
18 not going to have incomplete documents being put in front of
19 our witnesses. That's inappropriate.

20 And we identified these errors two weeks ago, and we
21 certainly have worked very hard to assist in helping them on
22 that, but, at some point, there is a, you know, my colleagues
23 are not working for plaintiff's counsel. So we did our level
24 best late last night to give, get two of the documents
25 complete, but I'm going to object to any line of questioning on

1 any documents that are incomplete.

2 THE COURT: Okay. And so the notations, so the, if
3 these exhibits were complete -- just want to make sure I
4 understand what the nature of the incompleteness is. So
5 there's kind of attachments, Excel spreadsheets, deposition
6 transcripts?

7 ATTORNEY NUNAN: Can I approach so you can see the --

8 THE COURT: Yes. Obviously, you've seen them,
9 Mr. Schroeder, right?

10 ATTORNEY SCHROEDER: Yeah. We might be able to put
11 them on the screen.

12 ATTORNEY NUNAN: So the yellow boxes, which are not
13 relevant to what we're going to be asking about, are the
14 comments.

15 ATTORNEY SCHROEDER: Which one is that, Sarah?

16 ATTORNEY NUNAN: You had given us 40A and 50A.

17 THE COURT: So you know what these are then, Mr.
18 Schroeder? Would you like to see them before I --

19 ATTORNEY SCHROEDER: No, no. You can go ahead, Your
20 Honor. I was going to introduce them as well just to kind of
21 speed things along this morning in Mr. Herrick's direct
22 examination.

23 THE COURT: Okay. So, for example, then 40A, what is
24 incomplete then about this?

25 ATTORNEY SCHROEDER: It's not incomplete, Your Honor.

1 THE COURT: Oh, this is complete?

2 ATTORNEY SCHROEDER: Now it is. So 40A and 50A,
3 which we've already talked to plaintiff's counsel and we're in
4 agreement, I believe, on the complete documents. So what the
5 complete document for the other ones, I don't know for sure
6 what's incomplete. Ms. Martinez has a photographic memory. I
7 don't. But there are additional comments that people have
8 embedded into the Excel sheets that we know exist.

9 We didn't have them on our exhibit list. We don't need
10 them. But they're on plaintiff's exhibit list. We identified
11 these issues two weeks ago, including these two. We just
12 happened to go through this process last night at the request
13 of plaintiff's counsel, and we've now complete documents. So
14 now, that's now a complete document, but there are five other
15 documents that are not complete.

16 THE COURT: And these are all exhibits anticipated to
17 be, admission to be sought through Dr. Merrens or --

18 ATTORNEY SCHROEDER: No.

19 ATTORNEY NUNAN: Heather Gunnell.

20 THE COURT: Who is a little later?

21 ATTORNEY SCHROEDER: Right, she's going to testify
22 today. They're Plaintiff's Exhibits. They're not our
23 exhibits.

24 THE COURT: Right, right. But it wouldn't be for
25 Dr. Merrens. So I guess what I'm getting at is, Is there a

1 chance that these documents can become complete by the time
2 they're proposed to be used?

3 ATTORNEY NUNAN: I don't have the native format. I
4 would have been happy to convert them. I can't find the
5 originals. I have the what came to us as PDFs, but I do not
6 have the original native Excel spreadsheets. So I would have
7 been happy to do that last night. I could not locate them.

8 THE COURT: Okay. So it sounds like, then, this
9 particular issue will never be resolved, right?

10 ATTORNEY NUNAN: Unless we're able to get them from
11 them tonight. We've asked. I mean, leading up to now, we have
12 worked quite well together. I have to say Megan and Morgan
13 have been lovely about going back and forth. They couldn't
14 find some of their documents before trial. We provided them.
15 And this seems like in the same vein.

16 I would like to say it's the cover email that I'm
17 interested in. The spreadsheet is great, but I don't find
18 those comments to be incredibly relevant to what I'm asking. I
19 understand the completeness issue. Yeah, I haven't seen them
20 but --

21 THE COURT: The exhibits right now are incomplete, so
22 --

23 ATTORNEY NUNAN: The exhibits right now are the cover
24 email and the Excel spreadsheet without the metadata, without
25 going in and -- you know, you have to go into Excel, and you

1 have to click "Review", and you have to plug in the comments.
2 This isn't obvious on the face of the Excel spreadsheet.

3 THE COURT: Okay. So, when you say metadata, though,
4 so, looking at the complete Exhibits 40A and 50A, the
5 information in the yellow boxes, are you counting that as
6 metadata?

7 ATTORNEY NUNAN: That is what my understanding is.
8 It's comments that have been attached to the Excel spreadsheet,
9 and I'm not saying it's not, without them it's not complete.
10 It's not apparent when you open the Excel spreadsheet that it's
11 actually there.

12 THE COURT: Okay. So these are -- I just want to be
13 clear. These are like the notes that would be missing from the
14 other exhibits?

15 ATTORNEY NUNAN: That is exactly right.

16 THE COURT: Okay. And so your initial proposal when
17 we came out was you're proposing that you be allowed to
18 introduce these exhibits, conduct an examination without this
19 additional information. I thought you had said, and then it
20 can be added later, but it may never be able to be added,
21 right, based on what you're telling me?

22 ATTORNEY NUNAN: I think we could probably come up
23 with the complete attached spreadsheet later. The email, the
24 cover email itself is complete, as far as I know.

25 THE COURT: Right. But, now, for defendants to do

1 their examination, you anticipate wanting to get into this
2 information that's on the Excel spreadsheet?

3 ATTORNEY SCHROEDER: Absolutely. And, Judge, just
4 for the Court, if you'll indulge me for a second. Plaintiff's
5 counsel filed, I believe, eight motions to compel discovery in
6 this case. In 31 years, almost, of practicing, I have never
7 had a single plaintiff discrimination case where I produced
8 27,000 pages of documents, including all metadata. So we've
9 produced all that. We've gone above and beyond to complete
10 these two documents, but we are not going to expend resources
11 tonight to try to find documents that may or may not complete
12 the exhibits that they would like to identify.

13 We identified this specific issue on March 20th. That's
14 two weeks ago. A whole list of issues, specifically a
15 category, Excel does not contain comments from native version
16 for seven different -- these are the seven documents. We, out
17 of professional courtesy, completed two of them last night, but
18 I am not, I don't believe, under any obligation to complete
19 plaintiff's exhibits so that they can then examine my witnesses
20 when we've identified these issues two weeks ago.

21 We actually expended time last night, despite the fact
22 that we had to shuffle witnesses around because one couldn't
23 get here in time, and we alerted them at 6:00 o'clock last
24 night of that fact. That's above and beyond, Your Honor, any
25 obligation that we would have.

1 We produced these documents in native form. We produced
2 all the metadata at the appropriate time. I understand
3 Ms. Nunan's issue. We assisted in finding additional documents
4 for two of them last night, but the, we're going to put on
5 Dr. Merrens, Ms. Gunnell, and Mr. Herrick today. And
6 Mr. Herrick is retired, so he's under no obligation to coming
7 back here, and Ms. Gunnell is employed separately as well.
8 These are not DH employees.

9 THE COURT: And these are related, of course, to the
10 Gunnell examination?

11 ATTORNEY SCHROEDER: They, they may be related to
12 both Ms. Gunnell and Mr. Herrick. I don't know. I haven't
13 asked which one they're for, but they could be both of them
14 because I think there are a number of them that might apply to
15 both of them.

16 THE COURT: But two people who will be testifying
17 today?

18 ATTORNEY SCHROEDER: Exactly.

19 THE COURT: I'm not sure what I can do about this at
20 this point, Ms. Nunan. I mean, if the exhibit is not complete
21 and the defense anticipates conducting an examination that
22 wants to deal with the information that's not part of the
23 exhibit, right, I mean, even if somehow the exhibit could be
24 reconstructed after the witness examination is concluded, that
25 doesn't seem to be satisfactory, does it?

1 ATTORNEY NUNAN: I guess not.

2 THE COURT: I'm trying to work with you here. I just
3 don't know how, you know, not at the risk of being repetitive,
4 I just don't know how these witnesses could get up there and be
5 questioned by the other side without having all of the relevant
6 information, unless I'm missing something here.

7 ATTORNEY NUNAN: I would just submit that the yellow
8 boxes are relevant in those documents to numbers on the
9 spreadsheet, and I'm not going to be asking about the numbers
10 on the spreadsheet.

11 THE COURT: No, but I'm hearing that defendants will
12 be asking the witnesses about those numbers.

13 ATTORNEY NUNAN: Sure.

14 THE COURT: Right?

15 ATTORNEY NUNAN: Okay.

16 ATTORNEY SCHROEDER: Exactly, Your Honor.

17 THE COURT: And this is obviously information
18 produced by Dartmouth over the course of the case. Plaintiffs
19 are using these exhibits to examine Dartmouth witnesses.

20 ATTORNEY SCHROEDER: Correct.

21 THE COURT: You, it sounds like you likely do have
22 the relevant information, but I'm hearing your argument today
23 is that notice was given and you're not under an obligation to
24 provide this to plaintiff's counsel at this time.

25 ATTORNEY SCHROEDER: No, Your Honor. We produced

1 that information. They have access to it. She just couldn't
2 locate it and so --

3 THE COURT: Right.

4 ATTORNEY SCHROEDER: It's not that they don't have
5 it. They just haven't figured out how to put the exhibit
6 together like we did for the other two. I mean, we've gone
7 above and beyond, Your Honor. You know, it's not our
8 obligation to put together their exhibits for the exhibit list.

9 I will tell you, in the lead-up to this trial, we spent
10 hours going through all of their exhibits and identifying out
11 of, close to 75 out of 193 that were incomplete or had other
12 issues with that. That's not our obligation. We did it anyway
13 because we wanted to make sure that the documents went in and
14 they were complete and accurate, but, you know, the fact that
15 this is now coming up and we addressed it way ahead of time on
16 March 20th, and we laid this out, and they could have reached
17 out and said, Hey, we don't have this, we don't have that. You
18 know, because they can't locate it at this point. We had, we
19 had time to do that before trial. That was the whole point.
20 And so this came up last night for the first time.

21 ATTORNEY NUNAN: No, that's not accurate.

22 ATTORNEY SCHROEDER: Well --

23 THE COURT: But it was produced in native format,
24 you're saying?

25 ATTORNEY SCHROEDER: Of course, yes.

1 THE COURT: It was produced with all this information
2 on it?

3 ATTORNEY SCHROEDER: Absolutely, yes.

4 THE COURT: And so I'm just trying to be practical
5 here. If you produced it in native format, is it producible
6 again in native format for these two documents? I hear your
7 point about getting all this early and providing notice, but
8 can you give me a sense of how onerous that would be?

9 ATTORNEY SCHROEDER: Well, I don't know. It took
10 Ms. Martinez a while last night to put these two documents
11 together. I don't know, Your Honor. We produced 27 -- I know
12 we have the systems to go on the computer tonight if we had to,
13 but then that would mean we'd have to bring these witnesses
14 back.

15 THE COURT: Right. No, they're testifying today.

16 ATTORNEY SCHROEDER: Right. And, to be honest with
17 you, Your Honor, the other thing I wanted to raise is we've got
18 two witnesses tomorrow. I think we'll be done, we will rest
19 our case in chief, perhaps, by midday.

20 THE COURT: Tomorrow?

21 ATTORNEY SCHROEDER: Yes.

22 THE COURT: Wow, okay. That moves things up
23 significantly.

24 ATTORNEY SCHROEDER: But I, I wanted you to be aware
25 of that just in light of us having to shuffle some witnesses

1 around, but also I believe these three witnesses will be fairly
2 -- I think today will be a full day, and we'll be done with
3 them. But we could -- we've gone through this process, Your
4 Honor, and we spent a lot of time last night, which we didn't
5 have time for, because we had to move witnesses around because
6 one of them didn't make her flight because a flight delay,
7 Dr. Chertoff. And so we have to put Mr. Herrick on the stand.
8 Despite that change, we went to the nth degree to supplement
9 these two exhibits, but to put an onus on us to put together
10 their documents for examination, I think, is, is a bit much.

11 ATTORNEY NUNAN: I did approach them three mornings
12 ago to talk about this and try to understand. I did not
13 understand by looking at the face of this what the issue was.
14 We did meet and talk on March 20th, and I addressed there were
15 definitely issues with our exhibits, but I did stop somewhere
16 around 60 or 70 when I was finding that the incomplete
17 documents meant that the blank page after the email. I
18 thought, You know what? This is a waste of my time. I have
19 other things to do.

20 So we went through and identified everything that they
21 said was incomplete at that time for what we've needed so far.
22 We've worked very hard to do that. I did not understand the,
23 the review aspect of the Excel spreadsheet, and I did bring it
24 up three mornings ago and try to start the process then.

25 THE COURT: Okay. Well, you know, in the interest of

1 trying to have all relevant evidence, you know, before the jury
2 in this case, that's why I'm probing a little bit further to
3 see if there's a way that we might still be able to work this
4 out, but it sounds like -- you know, I've heard your point,
5 Mr. Schroeder, you don't think that you're under an obligation
6 to do it and, apparently, it would take too much time to be
7 able to assist in that regard.

8 ATTORNEY SCHROEDER: Well, just on that point, Your
9 Honor, we went to the nth degree last night to do that for two
10 of the exhibits, okay? At what point is enough enough in terms
11 of putting together these documents? And this email was sent
12 on March 20th, and I have a copy for the Court if the Court
13 would like to consider it, enunciating every category. There
14 were at least ten categories of documents that there were
15 problems with. That's not -- we spent a lot of time trying to
16 fix plaintiff's exhibits, and, at some point, now you're going
17 above and beyond professional courtesy, I believe, and we've
18 produced these documents, and we've produced them and we put
19 them on notice that they were incomplete.

20 We produced all the metadata. They asked for the
21 metadata. I think it's inappropriate to say, Well, they asked
22 for it, and we just couldn't find it. You have to click on
23 this. Well, that's what they asked for, and that was our
24 obligation under the rules, and we met that obligation. And
25 now it's, Well, we can't really locate it. Can we get some

1 help to find it? I'm not going -- we shouldn't be under any
2 obligation to do anything above and beyond what we've already
3 done, which is above and beyond even our obligations in this
4 case.

5 THE COURT: Okay. It seems like there's not much I
6 can do here, Ms. Nunan, on this point. I obviously appreciate
7 your raising it, but, if the exhibit is incomplete, it would be
8 obviously objected to, and I'd be hard-pressed to find a way to
9 allow the exhibit to come in if it's not a complete exhibit as
10 produced, so --

11 ATTORNEY NUNAN: Can I approach and get those
12 documents?

13 THE COURT: Of course.

14 ATTORNEY NUNAN: Okay, great.

15 THE COURT: Is there anything else to address at this
16 time?

17 ATTORNEY SCHROEDER: Yes, Your Honor. We just want
18 to make you aware, though, and we made plaintiff's counsel
19 aware last night at 6:00 o'clock when it became clear that
20 Dr. Chertoff missed her connection from Oregon, that, in light
21 of the fact that we have Dr. Merrens and Ms. Gunnell today, we
22 added Mr. Herrick today instead of tomorrow. So we put them on
23 notice of that at 6:10 last night. So that's the lineup today.
24 Mr. Herrick may go before Ms. Gunnell. But we gave them the
25 lineup last night and wanted to make sure that you understood.

1 We will put Dr. Chertoff on the stand tomorrow, and my
2 expectation -- just, I realize wait until the end of the day to
3 ask this question, but, while we're here, we might as well go
4 through it. Dr. Padin and Dr. Chertoff will testify tomorrow.
5 I do not expect any additional witnesses right now. I reserve
6 the right to perhaps supplement later today, but I actually
7 believe that those will be our last two witnesses and that we
8 will end our case in chief at that point, I suspect, around
9 lunchtime, if not sooner.

10 THE COURT: Okay. Do the plaintiffs, at this time,
11 anticipate a rebuttal case?

12 ATTORNEY VITT: We do.

13 THE COURT: Okay. Do you have a sense of how long
14 that would be? So you'd start tomorrow afternoon, potentially,
15 if the defense rests. Would that carry over into Monday?

16 ATTORNEY NUNAN: It depends on what time. I don't
17 know.

18 THE COURT: Okay.

19 ATTORNEY VITT: I mean, I don't want to make
20 commitments that we'll absolutely finish. I don't know how
21 long, you know, when they're going to get done, so --

22 THE COURT: Yeah. I'm just thinking ahead about
23 charge conference and things like that. So I was kind of
24 thinking that this was going, the defense case would end on
25 Tuesday and then with rebuttal we might not be doing a charge

1 conference then until Tuesday or Wednesday of next week, but
2 now we're on a more accelerated path, it seems.

3 ATTORNEY SCHROEDER: I think, Your Honor, when we
4 were talking about when we'd finish, I thought there would a
5 good chance we might finish Monday. I think, at this point
6 recalibrating, that we'll be done by midday tomorrow.

7 THE COURT: All right. We'll take it as it goes,
8 then, or as it comes. All right. I think that's all. I don't
9 have anything for you, so we'll bring the jury in and get
10 going.

11 ATTORNEY SCHROEDER: Thank you.

12 (The Jury enters the courtroom.)

13 COURTROOM DEPUTY: Your Honor, the matter before the
14 Court is Civil Case Number 17-cv-194, Misty Blanchette Porter
15 versus Dartmouth-Hitchcock Medical Center, et al. Present on
16 behalf of plaintiffs are Attorneys Geoffrey Vitt, Eric Jones,
17 and Sarah Nunan. Present on behalf of defendants are Attorneys
18 Tristram Coffin, Morgan McDonald and Donald Schroeder. We're
19 here for day nine of a jury trial.

20 THE COURT: Okay. Good morning. Since you left the
21 courthouse yesterday, has anyone spoken to you about the case,
22 or have you learned anything about the case other than what
23 you've heard in this courtroom? Okay. Seeing no hands raised,
24 defendant may call its next witnesses.

25 ATTORNEY McDONALD: Defendants call Dr. Ed Merrens.

1 DIRECT EXAMINATION BY ATTORNEY McDONALD

2 Q. Good morning, Dr. Merrens.

3 A. Good morning.

4 Q. Welcome back to the witness stand. We heard from you
5 yesterday, but I don't think we got a lot about your
6 background. So can we just start off, can you give us a little
7 bit of information about your educational background?

8 A. How far back do you want to go?

9 Q. Let's go college.

10 A. I went to -- I grew up in Plattsburgh, so I spent a lot of
11 time in this area, and I went to Dartmouth college. Following
12 that, I went to medical school at Dartmouth. It was Dartmouth
13 Med School at that time. Now it's the Geisel School of
14 Medicine. Following that, I trained at the University of
15 Washington in Seattle in internal medicine. I was chosen as a
16 chief resident, and I served another year as a chief resident
17 at the University of Washington, and then I joined
18 Dartmouth-Hitchcock in 1998.

19 Q. And have you been with Dartmouth-Hitchcock since 1998?

20 A. Correct, yes.

21 Q. Can you give us a sense of the various roles you've held
22 during your time at Dartmouth-Hitchcock?

23 A. Yeah. I joined as a general internist in 1998 and grew
24 and developed a new, a whole new practice within internal
25 medicine called hospital medicine. I started a section. I

1 became the section chief of this new section of hospital
2 medicine, taking care of patients in the hospital. I was
3 involved in the residency program. I was a medical director in
4 2000. I led the section and grew it from 4 people, and now
5 it's about 70 people.

6 I became the chief medical officer in 2011 for the
7 hospital, the role that Dr. Padin who has testified before the
8 court held for, and she's a chief medical officer, so I held
9 that role until 2016 when I became the chief clinical officer.

10 Q. What sort of duties do you have as the chief clinical
11 officer?

12 A. I oversee really the clinical care delivery across our
13 entire system. So and we have a number of critical access
14 hospitals, community hospitals, PPS hospitals in both Vermont
15 and New Hampshire and a wide array of community group practices
16 down in southeastern New Hampshire where the real population
17 center is for the state of New Hampshire. All the chairs, all
18 the chairs, clinical chairs of all the departments, and we've
19 heard about OB/GYN, but we have medicine, surgery, pediatrics,
20 cancer, and centers, again, a center for digestive health, a
21 heart and vascular center, all those leaders report to me.

22 I have a series of chief medical officers across the
23 hospitals and in our own system that report to me: our
24 information system, informatics, compliance, supply chain, a
25 whole range of things that have physicians engaged in that work

1 all report to me. I have a direct report to our chief
2 executive officer, Joanne Conroy.

3 Q. Thank you. And I think you testified yesterday. I want
4 make sure I have this right. You oversee around 1,500
5 physicians throughout the organization?

6 A. Correct. It is a mix. We have physicians and advanced
7 practitioners. Those are the professional staff that we think
8 about.

9 Q. Do you know a Dr. Misty Porter?

10 A. I do.

11 Q. And how do you know her?

12 A. I know her, and I knew her as a doctor within reproductive
13 endocrinology and infertility, and I knew her as a member of
14 the Hitchcock Clinic, the group that we're in, but I really, I
15 met Misty in my role as the chief medical officer really in
16 2012.

17 Q. And can you describe the circumstances under which you
18 became more familiar with Dr. Porter in the 2012 timeframe?

19 A. Yeah. At that time, Dr. Porter was having some challenges
20 working with her chair at the time, Dr. Reindollar. He was the
21 chair of obstetrics and gynecology and also, I believe, led
22 reproductive endocrinology and infertility, and I think they
23 were having some issues working together and how they
24 collaborated, and I think it was incredibly stressful for her,
25 and she came to me in that role as the chief medical officer to

1 talk about that.

2 I think it was also a time in her life when she'd been
3 offered a position in Hawaii to take a role there, and that was
4 part of the discussion as well, and I think she was thinking
5 about where she would go with her career, what were the
6 opportunities here, and a range of things. So this was a
7 discussion about some stress she was having with working with
8 Dr. Reindollar and the work that she was engaged in but also
9 some more broader issues around what was the nature of her
10 career and some decision making.

11 So I think she reached out to me as kind a neutral
12 ombudsman, and that is really the role of the chief medical
13 officer. I think Dr. Padin talked about that, that in the
14 organization that's someone that physicians can go to if they
15 have concerns, and, even if they're lesser concerns, there's a
16 lot that reports up to the chief medical officer.

17 So she reached out to me. We had a number of meetings in
18 my office. I worked to engage someone to help her from outside
19 of the organization, and I think that process that started in
20 2012 went into 2013 around how she could better work with
21 Dr. Reindollar and figure out how things went. So that was the
22 nature of those interactions, those interactions and several
23 meetings. I think we met maybe three times in my office from
24 September through December of 2012, and I know some of this
25 work continued into 2013.

1 Q. Thank you. I'm going to show you a few documents that I
2 think relate to the issue that you just described. I'd like to
3 talk about them with you if I could. Can you to flip to
4 Exhibit C which is in the defendant volume, one of the black
5 binders? Should be Volume 1.

6 A. I'm just going to read this.

7 Q. Take your time.

8 THE COURT: Can we please put that exhibit up for the
9 Court and counsel?

10 BY ATTORNEY McDONALD:

11 Q. Mr. Howe might need to. Have you had a chance to review
12 it?

13 A. I have.

14 Q. Is this an email that you wrote to Alan Weston and
15 Michelle King on November 1st 2012?

16 A. I did.

17 ATTORNEY McDONALD: I'd like to move for the
18 admission of Exhibit C.

19 THE COURT: Any objection?

20 ATTORNEY JONES: No objection.

21 THE COURT: So Defendant's Exhibit C is admitted.

22 (Defendant Exhibit C is admitted into evidence.)

23 BY ATTORNEY McDONALD:

24 Q. Does this email refer to the issues that you were just
25 describing?

1 A. Yes, it does.

2 Q. Okay. Line 2 of this email states, "She", and I assume
3 she is Misty, "will not meet with him", being Richard
4 Reindollar, "alone due to past interactions and requests
5 another person to be there". Did I read that correctly?

6 A. That is correct.

7 Q. Do you have any understanding of why Dr. Porter did not
8 want to meet alone with Dr. Reindollar?

9 A. I think she'd had interactions with him that she felt were
10 not positive. There might have been an issue of kind of the
11 power differential or -- I wasn't aware of all the issues. We
12 had developed actually a pretty, I think, a good relationship
13 around these issues, and she actually, I think she wanted me to
14 be at this meeting, and so I think that that's what's being
15 stated.

16 ATTORNEY McDONALD: I apologize. Could we publish
17 this for the jury?

18 THE COURT: Yes.

19 BY ATTORNEY McDONALD:

20 Q. Thank you so much. Dr. Merrens, you anticipated my next
21 question --

22 A. Sorry.

23 Q. -- which was about -- no, it's great -- which is the
24 sentence that begins with, "Misty has requested my presence".
25 Am I understanding correctly that Dr. Porter wanted you to be

1 there for the meeting with Dr. Reindollar?

2 A. Yes.

3 Q. I'm sorry. Go ahead.

4 A. I'm sorry.

5 Q. No, no, finish. Go ahead.

6 A. I just said "yes".

7 Q. Okay. And do you have a sense of why she wanted you to be
8 there?

9 A. I think we had met a number of times, and I think in those
10 discussions she had found me to be neutral, understanding, and
11 a someone that was her advocate for having a discussion, not
12 necessarily knowing all the issues. Certainly, a discussion
13 that would follow would be a shared discussion around how
14 things work, but mediation, sometimes going into mediation is
15 stressful in and of itself, and you want to bring someone with
16 you who has heard the story and things like that, and,
17 typically, in our organization we have ombudsmans and people in
18 HR that can do that, but I think that, in this case, we'd had
19 several meetings and she wanted me to be engaged.

20 Q. You referenced mediations. Were there sort of formal
21 mediations related to this issue?

22 A. I actually don't know. I think, I think it, I think what
23 happened there might have been a meeting with HR that happened,
24 and we have people from human resources that are involved with
25 departments and can step in and be there as a, you know, a

1 patient, you know, employee-relations-related human resources
2 expert, and they usually step in there.

3 Q. Thank you. All right. You can set that one aside. I'm
4 going to ask you now to look at Defendant's Exhibit B.

5 A. Are you going to put it up on the screen? Okay.

6 Q. It's also in the binder, whatever is easier.

7 A. The screen is fine.

8 ATTORNEY JONES: I hat to interrupt, Your Honor, but
9 we're having a hard time hearing you, Morgan. Can you just do
10 something with the microphone?

11 ATTORNEY McDONALD: Sorry.

12 THE WITNESS: Can you hear me okay?

13 ATTORNEY JONES: You're fine.

14 BY ATTORNEY McDONALD:

15 Q. And I'll give you chance to review that. Let me know when
16 you're all set.

17 A. I've read the two pages.

18 Q. Great. Do you recognize this email?

19 A. I haven't seen it in a while, but, yeah, I sent this, or I
20 participated in this exchange.

21 ATTORNEY McDONALD: Okay. Move for the admission of
22 Defendant's Exhibit B, as in boy.

23 THE COURT: Any objection?

24 ATTORNEY JONES: No objection?

25 THE COURT: Okay. Defendant's Exhibit B is admitted.

1 (Defendant Exhibit B is admitted into evidence.)

2 ATTORNEY McDONALD: So, turning to the second page of
3 this document, this appears to be an email from Dr. Porter to
4 you, subject "Meeting with Richard". And can we have this
5 published to the jury as well?

6 THE COURT: Yes.

7 BY ATTORNEY McDONALD:

8 Q. Sorry. Okay. And Dr. Porter writes, "Hi, Ed. I
9 appreciate your kindness and sensitivity in this process", and
10 then skipping a paragraph, the next paragraph says, "I have
11 felt bullied repeatedly by Dr. Reindollar and I have felt he
12 has misrepresented what I have said in the past. Thus, I do
13 not feel I can meet with him alone". Did I read that
14 correctly?

15 A. Yes.

16 Q. Okay. Do you remember receiving this email from Dr.
17 Porter?

18 A. I do.

19 Q. What was your response to that information?

20 A. Do you want me to read -- is my response here?

21 Q. Yeah. Just generally, did you have a reaction when you
22 received that information?

23 A. Well, there's a couple things in here, and I forgot the
24 name, but, when we had initially met working with human
25 resources, I put Dr. Porter in touch with Marcia Borling as

1 someone she could meet with and could help with mediation.
2 That was one. This sounds like it is a new discussion and
3 going forward. So I hadn't remembered that, that name.

4 Yes. So I think she wants someone to be part of this
5 discussion and is entering into it with a lot of concerns, and
6 I certainly understood that, and I think, if it -- and I
7 probably am not the right person to be involved in a, in an
8 employee relation case, and we have other people that could do
9 that, but I sensed that she was worried that she was going to
10 go into this meeting and not have the support that I think that
11 she wanted. I think also in this exchange -- yeah. That's
12 probably my answer.

13 Q. And, if you turn to Page 1 of this document, underneath
14 the piece that says "Original message sent on November 1, 2012
15 at 6:08 p.m.", Dr. Porter writes, "It's hard for me to see how
16 you would not be neutral". Did I read that correctly?

17 A. You did.

18 Q. So fair to say, in the 2012 timeframe, Dr. Porter felt
19 that you could be a neutral person that might be able to assist
20 with conflict with her colleagues?

21 A. Yes.

22 Q. Set that one aside. I'll ask you now to turn to Exhibit
23 D, please. I'll give you a moment to review that as well.
24 This is a few pages, so I'm not sure if it would be easier to
25 look in the binder for you.

1 A. Which binder is it?

2 Q. It is defense binder. Should be Volume 1, one of the
3 black binders.

4 A. E?

5 Q. D, as in dog.

6 THE COURT: And can that be placed up on the screen?

7 Thank you.

8 THE WITNESS: So I'm just -- the more recent stuff is
9 the first part, and you have to go back and see the start of
10 it.

11 BY ATTORNEY McDONALD:

12 Q. Yeah, it might be helpful to review it from the back
13 forward.

14 A. Okay. I have read the documents.

15 Q. Do you recognize this email?

16 A. I do.

17 Q. Is this an email chain with the top email being sent from
18 Dr. Porter to you in December of 2012?

19 A. Correct.

20 ATTORNEY McDONALD: Move for the admission of
21 Defendant's Exhibit D, as in dog.

22 THE COURT: Any objection?

23 ATTORNEY JONES: Assuming it's just this one page, no
24 objection.

25 ATTORNEY McDONALD: There are four pages.

1 ATTORNEY JONES: Okay. I only see one right here.

2 ATTORNEY SCHROEDER: You have Defendant's Exhibits.

3 ATTORNEY JONES: I don't have my notebook right here.

4 No objection.

5 THE COURT: Okay. Exhibit D is admitted.

6 (Defense Exhibit D is admitted into evidence.)

7 ATTORNEY McDONALD: Could we have that published for
8 the jury, please?

9 BY ATTORNEY McDONALD:

10 Q. So, turning to the third page of this document, there is a
11 reference to a mediation that is to take place in December. So
12 was that what we discussed before?

13 A. Yeah, I think there was going to be a process of a
14 mediation.

15 Q. Okay. And it says, "Scope, the purposes of the mediation
16 are to improve the working relationship between Dr. Reindollar
17 and me", and this is written by Misty Porter, "and to improve
18 the working relationship between Dr. Reindollar and staff".
19 Did I read that correctly?

20 A. Yes.

21 Q. And in the email above that there is some discussion about
22 whether legal counsel should be involved in this process. Do
23 you have a memory of that discussion?

24 A. The discussion, I think, occurred -- I can't remember if
25 we met. There was some, some reference in here to a

1 discussion. At this point, I considered this a
2 workplace-related issue that we would talk about and use HR. I
3 didn't see this as a legal issue, and I, I, the issues that we
4 had discussed I didn't recognize as legal issues. They were
5 how people interact, how people feel about those interactions,
6 how we can work better together as a team.

7 That was how I viewed it, and I thought getting a mediator
8 to bring people together, I didn't see this as a legal process,
9 and I think these emails are the first time this is being
10 raised as a legal, something that would, that would evolve to
11 be a legal claim or a legal process involving an attorney.

12 Q. Dr. Porter wanted to be represented by a legal counsel in
13 this mediation; is that correct?

14 A. That, that is correct.

15 Q. And do you have an understanding as to who her legal
16 counsel was at that point?

17 A. I think she stated that Attorney Vitt was her
18 representative counsel.

19 Q. Thank you.

20 A. This, the only other thing is that there's references
21 about Elizabeth Todd. I hadn't met with Elizabeth Todd, and
22 the discussions that Dr. Porter and I had I don't think
23 involved Elizabeth Todd. There may have been discussions about
24 the, the bigger team. I was really focused on Dr. Porter and
25 what she was representing.

1 Q. And I think you're referring to the final paragraph on the
2 third page, correct?

3 A. Yes.

4 Q. And that says, "Elizabeth Todd and I will attend the
5 mediation. I assume that Dr. Reindollar will attend as well.
6 Elizabeth Todd and I are represented by Geoffrey Vitt, and we
7 would expect him to attend". Did I read that correctly?

8 A. That's correct.

9 Q. Thank you. Dr. Merrens, you can set that one aside. Do
10 you have any memory as to whether this particular conflict was
11 ever resolved?

12 A. I actually don't. I don't. I set the wheels in motion in
13 terms of discussions and where things went and a discussion
14 that would happen. Somewhere in the midst of this, the woman I
15 referred to, Marcia Borling, had a devastating stroke, and that
16 may have disrupted some of the work that was happening as she
17 wasn't able to participate in the mediation process. But I, I
18 believe that, by virtue of the discussions that I had with Dr.
19 Porter that we had really activated the human resources
20 component. The chief of human resources was involved.
21 Michelle King, who worked in human resource, was also involved.
22 We had the mechanism of understanding within employee relations
23 and human resource that, I think we have a problem here, and I
24 expected they would pick this up and kind of continue to work
25 with it.

1 Q. Subsequent to this issue that was in the 2013 timeframe,
2 did you continue to have frequent interactions with Dr. Porter?

3 A. I did not.

4 Q. How often would you see Dr. Porter subsequent to that?

5 A. I didn't. I mean, I would see Dr. Porter maybe walking in
6 the hallway or in the cafeteria, but we didn't have any regular
7 or any kind of interactions.

8 Q. Did you have any understanding as to what was happening
9 with her practice in the 2013 to 2017 timeframe?

10 A. Related to her practice, the only thing that I was aware
11 of was that, at some point, Dr. Porter was out on partial and
12 then long-term disability.

13 Q. Did Dr. Porter ever reach out to you with a complaint
14 about Dr. Hsu or Dr. Seifer?

15 A. She did not.

16 Q. Switching gears a little bit, as you know from watching
17 the testimony in this trial, the REI division closed in the May
18 of 2017 timeframe, correct?

19 A. Correct.

20 Q. At the time of the closure of the REI division, did you
21 have any knowledge as to the nature of Dr. Porter's illness?

22 A. No, I didn't. I had no, no knowledge of her illness then
23 or when I was deposed. I only learned the nature of her
24 illness when it was in the "Valley News" two weeks ago, shared
25 with them, and then what's been shared in the trial. I had no

1 knowledge of any aspect of her illness or reason for needing to
2 be on leave.

3 Q. No, no knowledge as to the specifics of her course the
4 care?

5 A. None whatsoever.

6 Q. Okay. And would it be abnormal for you to not know about
7 a particular clinician's leave of disability in your role?

8 A. I would not -- you know, I would never need to know the
9 reason for someone being on leave or disability, and I might
10 not know in the, of all the sections, all the departments,
11 hospitals who might be out on disability.

12 You know, it came at a time for this division in which we
13 were hiring new people and, and, you know, even in the, even
14 early on staffing was a challenge. And so I knew in the
15 context of meeting with Dr. DeMars that there were staffing
16 issues and that Dr. Porter was on leave for a period of time.
17 So that's the only context that I, that I knew about it. I
18 knew that we had recruited a new physician, Dr. Albert Hsu, but
19 I didn't, I didn't -- I knew nothing about the details of her
20 disability.

21 Q. How often did you interact with Dr. Hsu?

22 A. I didn't interact with Dr. Hsu.

23 Q. Did you ever meet him in person?

24 A. I did not. I met him on May 4th when we announced to the
25 individual members of the division that we were closing the

1 division.

2 Q. Prior to the decision to close the division, were you
3 aware of any patient concerns about Dr. Hsu?

4 A. I was not.

5 Q. In the months preceding the closure of the REI division,
6 were you aware of concerns about Dr. Hsu from any of his
7 colleagues, any other providers at Dartmouth Health?

8 A. I was not. I think that the only concern that was raised
9 was there was a time in which he was the solitary reproductive
10 endocrinology and infertility physician in the division and was
11 struggling with completing his documentation. That came up in
12 conversations with Dr. DeMars. I believe Dr. Hsu reached out
13 to me saying, I'm buried in documentation and trying to keep up
14 with things. I can't remember. I mean, we had implemented a
15 pretty strict guideline around completing notes and
16 documentation, and every week we -- so I think he was, he was
17 getting behind. I believe Dr. DeMars mentioned this and he
18 reached out to me personally, and I think they were working
19 with him on note completion. That was all I knew about
20 Dr. Hsu.

21 Q. So it's safe to say that you weren't aware of any report
22 that Dr. Hsu had performed a procedure without patient consent?

23 A. Absolutely not.

24 Q. Or any report related to fraudulent billing practices?

25 A. No, none whatsoever.

1 Q. Do you recall seeing evidence in this trial of an
2 eleven-page letter that Dr. Porter wrote about Dr. Hsu?

3 A. I do.

4 Q. Had you, at the time you made the decision to close the
5 REI division, had you seen this letter?

6 A. I had not.

7 Q. Had anyone made you aware of that letter, the existence of
8 that letter?

9 A. No. I had never seen it nor aware of its content.

10 Q. Do you know where Dr. Hsu is working now?

11 A. Dr. Hsu is now the IVF medical director at the University
12 of Cincinnati, part of their women's health division. I don't
13 know how long he's been there, but he's associate professor and
14 works -- I think they have three centers in Cincinnati.

15 Q. Turning now to Dr. Seifer, have you ever met Dr. Seifer?

16 A. I only met Dr. Seifer on May 4th when we closed the
17 division.

18 Q. At the time of the closure of the division, were you aware
19 of any specific concerns from patients about Dr. Seifer?

20 A. None whatsoever.

21 Q. Any specific concerns from Dr. Seifer's colleagues?

22 A. None.

23 Q. Do you know where Dr. Seifer is working now?

24 A. I believe he's at Yale in their reproductive endocrinology
25 and infertility division.

1 Q. Do you have any knowledge of whether any malpractice
2 claims were brought against Dr. Hsu or Dr. Seifer during their
3 time at Dartmouth Health?

4 A. There have been no claims whatsoever. We're a
5 self-insured program. I'm actually the president of our
6 malpractice group. We're entirely self-insured. We have no
7 claims from the period of time that kind of we've been
8 discussing in this courtroom, like 2013 to the ending of the
9 program in 2017, none that have been made, none that are
10 pending.

11 Q. Thank you. Are you familiar with the Value Institute at
12 Dartmouth Health?

13 A. Yes.

14 Q. Can you describe what that is?

15 A. The Value Institute is kind of an internal consulting
16 group led by people that are experts in process, identifying
17 problems, solutions, and kind of pathways. So there's all this
18 work in the business and manufacturing industry around Lean Six
19 Sigma and black belt. Really what it is is, like, How do you
20 understand production systems? And it really grew out of
21 Toyota's production system around how processes can be very
22 efficient and anyone can kind of pull the cord to stop things
23 and do things.

24 So, at any rate, we developed our own internal kind of
25 team of black belts that could come into a department, a

1 section, an area and understand what's working well in here, of
2 what's not working well in here in terms of patient care
3 delivery, how an operating room flows, how people work
4 together. So it's, and it's really getting that group to kind
5 of go through, How do things work in your division?

6 And it's sometimes triggered by, Gosh, we need help, and a
7 lot of people can do that. We might have a practice manager or
8 a director or a VP say, We really need to get the Value
9 Institute in here to kind of get someone to understand things,
10 and they can bring a lot of resources and understanding in
11 terms of kind of everything. It's really designed around how
12 teams can function and ultimately deliver really good care.

13 So we've been doing this for a number of years, and we
14 have the other thing that the Value Institute does is it trains
15 people in value, kind of, this kind of training. So we have
16 our own -- you can be a yellow belt, a green belt. You do
17 projects around efficiency and quality and safety and teams and
18 dynamics and things like that.

19 So we train people as part of this as well, but we've got
20 an expert team that comes in. I mean, there are organizations
21 nationally that will do this. You can bring in an organization
22 to kind of look at your processes as a consultant, and we've
23 really developed this internally. It's been actually a really
24 great asset. You seldom have the opportunity to kind of
25 reflect on things.

1 They come in sometimes just to actually look at really
2 good process like, How are you able to do this, and could we
3 extrapolate that to other areas? And sometimes they come in
4 when there is like things aren't going well, and this is what
5 we're seeing, but sometimes what you're seeing isn't exactly
6 why it's, the reason why it's happening, and they can, they can
7 look at the processes. So that's, that's what the Value
8 Institute it.

9 Q. Do you know whether the Value Institute ever became
10 involved with the REI division?

11 A. Yes.

12 Q. And how do you know that?

13 A. So I've been, you know, part of my work as well is working
14 with the other executive leaders in the organization. So all
15 the -- we have a small team of vice presidents. One of them
16 was Daniel Herrick. So I was aware that that team and working
17 with Heather Gunnell, who was the director in OB/GYN, that they
18 had engaged the Value Institute, I'm thinking, maybe in the, in
19 2016, 2017. I'm not sure of the dates, but they had reached
20 out.

21 It wasn't at my behest. It was, they had reached out to
22 engage with them, and Daniel had, Daniel, who I met with kind
23 of regularly to touch base on a range of things, he covered the
24 enter perioperative service, both at the hospital and some of
25 the system, but all of the surgical services. So I was aware

1 that they were engaged in some way.

2 Q. When you said they reached out, did you mean that the
3 Value Institute reached out to the REI division or the REI
4 division reached out to the Value Institute?

5 A. I think that it is my understanding that the leadership in
6 the department, likely Heather Gunnell and Daniel, reached out.
7 That's my understanding of how it worked. And what happens is
8 there's an intake process where someone says okay, and then
9 they decide who is going to, how are they going to staff it,
10 how are they going to schedule it? They do things in the form
11 of retreats where they actually kind of pick you up and have
12 you meet in a conference room kind of thing, but I wasn't aware
13 of anything that happened there.

14 I believe it was Heather and probably Daniel who was
15 involved in that.

16 Q. And do you have a sense of what the goal of that
17 particular interaction was, or would that be a better question
18 for maybe Daniel?

19 A. I'm not sure of what the question was. A rough, you know,
20 from my perspective talking with Daniel is that they were at a
21 time even before the Value Institute was involved. And I
22 didn't know this at the time, but we've talked about this is
23 that they had began -- they had trouble, they had trouble with
24 staffing, and they were putting a pause on patients coming in,
25 and there were certainly issues that were happening with the

1 team in terms of coordinating of patient care, and I think it
2 was with that outreach they said, We need to figure out how we
3 can do things.

4 So I think it was my understanding at a really high level
5 is like, we have a patient care, scheduling, team coordination,
6 working together kind of issue, and how can we, how can we get
7 some insights into this? And I think early in 2016 we were
8 struggling with nurses. We heard about nurses leaving, how
9 that was going to work, the amount, you know, and that was,
10 that was one of the growing concerns that was happening. So I
11 think that was part of it, but I wasn't, I didn't request it,
12 and I wasn't part of the process of working with the Value
13 Institute.

14 Q. And you said, We were struggling with nurses. Did you
15 mean the entirety of the hospital system, or are you referring
16 to the REI division?

17 A. I think everyone has said that we're all struggling,
18 struggling with nurses. The nurses are the most important
19 people within the patient care paradigm in any hospital. 24/7
20 nurses are working in the hospital and are essential components
21 of the clinic. They're highly specialized. They require a lot
22 of training. And I think my understanding was that, especially
23 in REI, we were losing people. Some people had left, had been
24 asked to leave, had retired, and we were not able to recruit
25 the people to step in and be trained in those roles. That was

1 my very generalized understanding of kind of what was
2 happening, especially in REI.

3 Q. Did you ever receive information about findings or
4 conclusions from the Value Institute with respect to their
5 interactions with the REI division?

6 A. I didn't receive a formal document. I had discussions
7 primarily with Daniel Herrick, who was the VP, around some of
8 the initial findings and perspectives on things.

9 Q. And what did Mr. Herrick share with you about those
10 findings?

11 A. I think the sense after a number of meetings that, that
12 there were some significant issues in terms of how this group
13 of physicians worked together or don't work together, how we
14 could or could not collaborate as it relates to protocols or
15 patient care, and that tenor and tone made it difficult to
16 recruit nurses to work in that group, and we would recruit
17 people, but we were worried about retention in that area. And
18 maybe the fact that we couldn't recruit nurses was a symptom of
19 something much larger in terms of a group that had, were not
20 working well together, complete dysfunction in terms of how
21 they worked with each other, mentored each other, shared
22 patients, did things, even agreed on things.

23 I think one of the things was the lack of agreement around
24 how to do things, and I think, you know, these were all really
25 good people, I mean, these are talented people, gone on to do

1 great things and but couldn't work with each other. And I
2 think that was echoing through the rest of the division and
3 their ability to kind of schedule patients, as we heard, but
4 also just be able to recruit nurses who want to be part of a
5 bigger team.

6 If there's anything that we recognized, and I recognize
7 this as a health care leader, is that what we do is team
8 support. It's not the great physician. It's actually the
9 great team, and that goes down to, like, the scheduler, the
10 secretary, the counselor. It's how we all work together, and,
11 if we're ever going to deliver, you know, care that doesn't
12 have a lot of variation and a lot of exceptions, we have to do
13 it together. And I think my sense was that was a real
14 challenge with that group, a significant challenge.

15 Q. Do you know whether Dr. DeMars was involved with the Value
16 Institute's interactions with the REI division?

17 A. I don't know.

18 Q. Okay. You testified both today and yesterday that you
19 made the decision to close the REI division. What information,
20 if any, did you rely on in making that decision?

21 A. Well, I made the decision, and I think that that came
22 after some understanding of what came out of a series of
23 meetings where after, after some discussions with the Value
24 Institute and discussions with Heather Gunnell, Daniel Herrick,
25 and Leslie DeMars, it became clear that, not only were we

1 unable to hire nurses as kind of the last straw, that we had a
2 team that couldn't work together and couldn't provide effective
3 care for our patients, and that's what, you know, what brought
4 about the decision.

5 I think there was discussion about how this could happen
6 that preceded meeting with me, and I think there was efforts,
7 and I think we certainly heard from Dr. DeMars that her intent
8 was just to close the in vitro fertilization component of it,
9 but, when I looked at the sum total of work, it was the same
10 team working in reproductive endocrinology, working doing
11 surgery, doing procedures, doing ultrasound, seeing patients in
12 clinic that were doing the IVF.

13 And, you know, a little bit of my own, you know, putting
14 things together is that I was not able, after lots of
15 discussions, to kind of separate, Well, in vitro fertilization
16 is just something else. You know, we can stop doing that, but
17 we can continue doing this, because -- and I couldn't get
18 beyond the because. Because this team works well together?
19 This is a completely dysfunctional area of people that don't
20 agree on anything, and no one wants to work with them.

21 So I was unwilling -- you know, I am not an expert in
22 hysteroscopy, myomectomy, IVF, dual lumen chamber. You know,
23 I'm not an expert in that, and I don't pretend to be. I am an
24 expert in how you lead a health care system, how you work with
25 people, how effective teams can come together and ultimately

1 provide incredible patient care. That's what I know. And,
2 from everything I heard -- I heard from Dr. DeMars. I heard
3 from Heather Gunnell. I heard from Daniel Herrick -- there was
4 no way this team could continue providing safe and effective
5 care in any manner, both in REI and IVF, and I made that
6 determination and decided to end the program.

7 Q. So I think you just said that you, in conversations with
8 Dr. DeMars and Dr., excuse me, and Daniel Herrick and Heather
9 Gunnell you got information pertaining to the decision to
10 close. Can you just give us some understanding of who Daniel
11 Herrick is? You started to speak about him a little bit
12 earlier, but can you just describe his role?

13 A. So Daniel was -- he subsequently retired -- was our vice
14 president. We had a handful, maybe four vice presidents in the
15 organization, that oversaw various enterprises, ambulatory
16 care. He oversaw all the surgical departments and the
17 perioperative environment. And so he was the person that
18 Heather Gunnell reported to. He was the person that -- so he
19 was, and, in addition to being a VP and kind of the person that
20 saw the big picture of things, actually, you know, one of these
21 people who had started Value Institute, had been involved and
22 was really skilled in kind of, you know, these kind of
23 processes. He brought fishbone diagrams to every discussion
24 that we had and was really involved in kind of that process.
25 So he had that additional expertise.

1 I would meet with Daniel regularly around a range of
2 things, surgical programming, productivity of organizations,
3 what we could do at other hospitals. So he was, he was totally
4 aware of things that were happening in this area.

5 Q. And did he, Daniel Herrick, have a recommendation as to
6 whether the REI division should be closed?

7 A. He did.

8 Q. And what was his recommendation?

9 A. I think his recommendation was that the entire division
10 should be closed.

11 Q. And he told that to you?

12 A. Yes.

13 Q. You also said that you spoke with Heather Gunnell about
14 this issue. Did she have a recommendation as well?

15 A. I think she felt similarly.

16 Q. Did you trust Ms. Gunnell's judgment?

17 A. I did.

18 Q. And how about Mr. Herrick's?

19 A. Yes.

20 Q. What was Dr. DeMars's role in these conversations?

21 A. Dr. DeMars was the chair of the department, the interim
22 chair, and had been deeply involved in all these discussions.
23 There was lots of meetings that happened without me, so these
24 people met and discussed. I think her approach and her
25 perspective were complicated. There were things that she knew

1 that were never represented to me. There were things that
2 occurred that she was aware of that were never shared with
3 anybody.

4 But, even though I didn't know things, I had already lost
5 my trust and faith in her as a leader, and she had a
6 perspective, and she was very adamant that she wanted to close
7 IVF but maintain REI, but I didn't see the thesis and the way
8 you would come around to that conclusion. So I listened to
9 her. I heard her recommendations and took those
10 recommendations and appreciated her thoughtful perspective on
11 things, and I wasn't dismissive in any way, but I had
12 completely lost faith in her as a leader, which really led to
13 me asking her to step down shortly afterwards.

14 Q. Yesterday Mr. Jones asked you to read from a portion of
15 your deposition and suggested that you testified that
16 Dr. DeMars recommended closure of the division. Do you
17 remember that interaction?

18 A. Part of it, yes. Yeah.

19 Q. Did Mr. Jones allow you to read the entirety of your
20 answer?

21 A. No. It was just a, it was the first sentence, but there
22 was a, there was more to that. I think -- I can't remember if
23 it was an email or a statement. There was more to that. I
24 tried to say it.

25 Q. Do you recall the specifics of your statement in the

1 answer that was not complete?

2 A. I, there was a part about recommendation, I think. I
3 don't have it in front of me, but I think it was that,
4 ultimately, I made the decision and that was a part that I,
5 that wasn't referenced in the question.

6 Q. Would it refresh your recollection if I showed you the
7 deposition testimony that we reviewed?

8 A. I think anything you show me will help with my
9 recollection.

10 ATTORNEY McDONALD: May I approach?

11 THE COURT: Yes.

12 BY ATTORNEY McDONALD:

13 Q. So Mr. Jones was referring to Page 21, Lines 24 through
14 Page 22, Line 8, if I could just ask you to read that, please.

15 A. I'm sorry. You want me to read through, read what, where
16 to where? So Leslie was the chair the of the --

17 Q. The question beginning at Line 24.

18 A. Okay. Am I -- so:

19 "Q. Sure. What was Dr. Leslie DeMars's role in the
20 decision to close the REI division?

21 "A. So Leslie was ultimately the person that made
22 the decision, that made the announcement to the group. This
23 was a decision that we supported after looking at the
24 information. Ultimately, this was my decision, but her role
25 was really kind of, to kind of understand all the information,

1 discussions that we had, and had to be able to convey this to
2 the department after a lot of careful thought."

3 Q. Thank you.

4 THE COURT: And is that ID4?

5 ATTORNEY McDONALD: Apologies. That is ID4.

6 THE COURT: Okay. Thank you.

7 BY ATTORNEY McDONALD:

8 Q. In any of these discussions that we've just talked about
9 with Ms. Gunnell, Mr. Herrick, or Dr. DeMars, did the subject
10 of Dr. Porter's disability ever come up?

11 A. Never.

12 Q. Did the subject of complaints Dr. Porter made about
13 Dr. Hsu or Dr. Seifer ever come up?

14 A. They did not.

15 Q. Who made the decision to terminate Dr. Porter?

16 A. I made the decision to close the division and terminate
17 the employment of three physicians, including Dr. Porter.

18 Q. Was anyone else terminated in connection with the closure
19 of the division?

20 A. Just Dr. Seifer and Dr. Hsu, in addition to Dr. Porter.

21 Q. I'm going to ask you to take a look at Plaintiff's Exhibit
22 63, and that document has been admitted, so I'll ask that to go
23 to be published to the jury.

24 Do you recall Mr. Jones showing you this document
25 yesterday?

1 A. I do, yes.

2 Q. And do you recall Mr. Jones pointing to a reference to an
3 inability to maintain highly specialized resources? And I
4 believe that that was on the page with the Bates number ending
5 in 10541. I can give you a hard copy if that would be easier.

6 A. It's on the screen. Just tell me where.

7 Q. I believe Mr. Jones referred to the second bullet point on
8 this page. Do you recall that?

9 A. Yes.

10 Q. And Mr. Jones noted the absence of any reference to
11 dysfunction in the department as between providers, correct?

12 A. Correct.

13 Q. Can you provide us with some context for this document?

14 A. The document that we talked about yesterday was a document
15 that I worked on with, with Dr. DeMars and people from the
16 division, as well as Steve Woods from employee relations. It
17 was really the script around the decision had been made. It
18 was not around the details of anything that went into the
19 decision being made. It wasn't a discussion. It was an
20 inability to maintain a highly specialized clinical resource.
21 It was really a description of everything that we couldn't
22 maintain, the people, the processes, the nurses.

23 So this was really, at a high level, the decision has been
24 made and these were the talking points. It wasn't a discussion
25 about or anything that we had that had been part of our

1 decision making.

2 Q. Any particular reason why this document does not
3 specifically state interpersonal conflict or communication
4 issues?

5 A. That may have -- this document isn't designed to highlight
6 those issues. You know, it's at my discretion to kind of ask
7 as we think about how we want to talk with people around
8 things. It is not to vet every little single thing. I'd made
9 a decision to close this program and wanted to highlight that,
10 you know, we couldn't maintain on many levels the ability to do
11 things well. That was the, that was the point that needed to be
12 made. It wasn't a discussion of, Hey, I want to discuss every
13 one of these little points.

14 And the information we sometimes share, that I sometimes
15 share in communications has to be based on the recipient in a
16 lot of ways. Like, if a nurse emails me, I might reply in a
17 way that a leader of a health organization might reply that is
18 supportive. It might be appreciative. It may be very
19 different from the underlying thinking or the decisions that
20 everything that has gone into the decision making.

21 So I think communications and emails and texts are really
22 important in this case. It belies the fact that much of our
23 work, like you do when you approach the judge, is done in
24 consultation, in coordination and discussion, and a lot went
25 into this. So this document was some talking points that we

1 had for discussion where we informed people for the first time
2 that we were ending a program and ending their employment.

3 Q. Just for some context, Dr. Merrens, was that the first
4 time that you had to make decision to terminate the employment
5 of physicians in the organization?

6 A. No.

7 Q. Had you had to do it on multiple occasions prior to this?

8 A. Yes.

9 Q. So you were sort of familiar with how to handle a
10 situation like this?

11 A. Correct.

12 Q. On this page with the Bates label 10541, there is a note
13 that we will be meeting, at the very bottom, "We will be
14 meeting with each of you individually to discuss your unique
15 situation". Was this the case for all three physicians --

16 A. Correct.

17 Q. -- that were terminated?

18 A. Yes.

19 Q. Each of Dr. Hsu, Dr. Seifer, and Dr. Porter all received
20 an individual meeting?

21 A. Yeah, we met with them. Dr. DeMars, Steve Woods from
22 employee relations, and myself met with them -- I think it was
23 in the conference room or the library in the department of
24 OB/GYN.

25 Q. And can you tell us or describe the meeting with Dr.

1 Porter?

2 A. Dr. DeMars did the talking, described that we were -- it
3 was a pretty brief meeting. She described that we were ending
4 the REI program, the entire program, and that we were
5 terminating the employment of the physicians, including Dr.
6 Porter, and there would be time and date and we would offer
7 severance and we would offer outplacement support and things
8 like that.

9 I made it really -- one of the things that I clarified for
10 myself going into the meeting is that this -- at the time, Dr.
11 Porter was on long-term disability, and I wanted to make it
12 clear in this meeting, while this was a termination and ending
13 the program, it had no impact on her long-term disability, and
14 I mentioned that in the meeting. Had no impact. It was --

15 So I, I actually had reached out to our chief human
16 resource officer just to make sure of this because it was so
17 important. Didn't want it to -- it is a shock enough to end a
18 program, and I'm sensitive enough to know that this is a big
19 impact on people, but I also wanted to understand all the, be
20 clear about the implications of a federal program and the
21 protection was not reliant on employment, so I mentioned that.

22 Q. What was Dr. Porter's reaction?

23 A. I think Dr. Porter was very quiet, like all the
24 physicians, I think was shocked. These were brief meetings.
25 It wasn't an opportunity -- there wasn't a, you know, there

1 wasn't really any discussion.

2 Q. And you mentioned, I think, support services were offered
3 to Dr. Porter and to the other physicians. Do you have any of
4 the details of those?

5 A. You know, I think that part of this was we would offer
6 counseling and outplacement services, like if we wanted to
7 engage them with a headhunter and be able to help them find
8 employment. I think that was those kind of services following
9 the termination.

10 Q. Thank you.

11 A. I think that the other thing that all of them would be
12 provided six months of severance as part of this, this deal so
13 that they would still be paid for six months while they engaged
14 in the process of finding another job.

15 Q. Do you know whether Dr. Porter accepted the six months'
16 severance?

17 A. No. I know that she met with our chief human resource
18 officer and was then offered nine months of severance. I think
19 Amy Giglio -- now she's Amy Claiborne -- met with her and made
20 the decision to offer her a longer period of severance.

21 Q. Okay, thank you. I'll ask you now to turn to Plaintiff's
22 Exhibit 79, which is another document that Mr. Jones showed you
23 yesterday, and this has been entered into evidence. So if I
24 could just ask that it be published to the jury.

25 THE COURT: Yes.

1 BY ATTORNEY McDONALD:

2 Q. Do you recall Mr. Jones showing you this document?

3 A. Yes.

4 Q. And I'll give you a moment to review. I apologize.

5 A. Yeah, thanks. Yeah, I've read it.

6 Q. Who are the recipients of this email?

7 A. That's a good question. It went to, it went to a range of
8 people in the department. I'm actually not completely sure who
9 the friends of OB/GYN are. I think I was not the -- it didn't,
10 it came -- I think communications probably helped with the
11 department, like things the department probably worked with our
12 communications team to kind of like make sure it got out to a
13 lot, all the people that would, that would want to know that
14 we'd made this significant change.

15 Q. A number of people received this email, correct?

16 A. Yes, yes.

17 Q. And did you feel an obligation to provide this group of
18 people with each and every one of the reasons that the REI
19 division closed?

20 A. I think I felt a desire to clarify and provide a little
21 bit more information around kind of what the next steps would
22 be. I think this group was primarily concerned with, like,
23 What do, what about our patients, and what about the rest of
24 our dedication to reproductive health and women's care? There
25 are always things that end up in the news, and we didn't put

1 out a news article around this.

2 So it was, it was also put out at a time where we spent --
3 and I think this team did a, did a lot of work contacting women
4 and tried as much as possible by phone around the upcoming
5 changes -- people had appointments, or some were in a variety
6 of cycles or things like that -- to contact people. So it was
7 some clarification and more information to the group.

8 Q. Okay. I'd ask you now to turn to Plaintiff's Exhibit 60.
9 That one has also already been admitted, so if that could be
10 published to the jury as well. You all set reading it?

11 A. I've read it, yes.

12 Q. Thank you. And Mr. Jones pointed to the paragraph that is
13 roughly in the middle of Page 1 where you state that, "On the
14 surface, we are pinning the dissolution of the REI program on
15 our failure to maintain and recruit nurses for this work, there
16 is ultimately a dysfunction of the physicians who worked in
17 this area for years, as well as recent hires, and ultimately a
18 failure of leadership for which I hold Leslie fully
19 accountable".

20 Can you explain why you did not want the dysfunction of
21 physicians who worked in this area for years to be the public
22 story?

23 A. Well, I may have said it yesterday. I'm not sure. I was
24 frankly embarrassed that we'd gotten to a point in which we had
25 completely, we had people that couldn't relate to each other,

1 couldn't coordinate and had gotten to the point we couldn't
2 hire nurses. I was embarrassed as an organization we had
3 gotten to this point. You know, the nursing issue is not like,
4 Oh, there's a shortage of nurses, and let's get a traveler,
5 we'll hire this person, we'll rehire this person.

6 This was a completely broken division. We had silos. All
7 these terms. People didn't agree. We couldn't even figure out
8 how to agree on how to do an intake form. We couldn't agree on
9 protocols, whether to use a stylette or not or how to do certain
10 things. And that rippled through, and it was clear that these
11 people couldn't work together, and in that context we couldn't
12 hire nurses and that was the, that was the thing that was hard.

13 I didn't feel obligated in any way to share with the media
14 that, Hey, by the way, we have, we have a dysfunctional group
15 of physicians, talented, you know, ultimately going to be
16 really successful, but they cannot work together, and it's
17 impacting what we can do.

18 I didn't know a lot of other things that were happening.
19 I could just get the sense this was not working. So I was
20 embarrassed that we got to that point, and I, also, this was a
21 failure of leadership, and I recognized that at that point as
22 well.

23 Q. Thank you, Dr. Merrens. Moving forward in time a little
24 bit, you had your deposition taken in the case, correct?

25 A. Correct.

1 Q. And do you remember when that was?

2 A. I'm going to say the summer of 2019.

3 Q. Does July 30th of 2019 sound right?

4 A. That's exactly the date I was thinking.

5 Q. Great. And, in the course of your deposition, were you
6 shown evidence of complaints that other providers in the REI
7 division made about Dr. Hsu and Dr. Seifer?

8 A. I was.

9 Q. Had you ever seen those reports and those documents prior
10 to your deposition?

11 A. I had not.

12 Q. I'll ask you to take a look at Plaintiff Exhibit 23. I
13 believe this one is in evidence, but I'll just ask -- thank
14 you. So can we have this published to the jury as well? I'll
15 ask you to take a moment to review that.

16 A. Should I be looking at the left, or which one? It's not
17 the one on the right, is it, or is that part of it?

18 Q. It looks like the one on the right is not part of it.

19 A. Okay.

20 Q. Look at the one on the left.

21 A. Okay.

22 Q. There is a second page so it might make more sense to look
23 at the hard copy in your binder.

24 A. Okay. I'll look at this.

25 Q. We might be having technical difficulties.

1 A. I have finished reading.

2 Q. Is this an email from Judith McBean?

3 A. Yes.

4 Q. And this is a, pertains to her concerns about Dr. Seifer,
5 correct?

6 A. Yes.

7 Q. She sent them to Leslie DeMars, correct?

8 A. Correct.

9 Q. Do you know whether Dr. McBean was retained after the REI
10 division was closed?

11 A. She was not part of the termination when we closed the
12 division. My understanding is that Dr. McBean was a generalist
13 OB/GYN who had trained at UVM but also did reproductive
14 endocrinology and worked in a per diem fashion helping out in
15 working with the group. That was my understanding of her. So
16 I don't think she was directly employed. I think she either
17 had her own practice or was at Brattleboro. That's the extent
18 of my knowledge. But she was part of the, she was part of the
19 team, but I think she was, she was mainly employed at
20 Brattleboro.

21 Q. But you're not aware of any adverse employment action that
22 was taken towards Dr. McBean after she submitted this report,
23 are you?

24 A. No. I had never seen this.

25 THE COURT: Okay. So I was going to say it's close

1 to 10:30. Take our break now?

2 ATTORNEY McDONALD: Agree.

3 THE COURT: All right. So we'll take our midmorning
4 break, and we'll be back at 10:45.

5 (A recess was taken from 10:29 a.m. to 10:48 a.m.)

6 BY ATTORNEY McDONALD:

7 Q. Dr. Merrens, before the break we were looking at
8 Plaintiff's Exhibit 23, which was the report from Judith McBean
9 to Dr. DeMars concerning her feedback regarding Dr. Seifer. I
10 may have asked you this question already, and I apologize if I
11 did, but had you ever seen this document prior to your
12 deposition?

13 A. I have not. I did not.

14 Q. And, again, your deposition was July of 2019, correct?

15 A. Correct, July 30th.

16 Q. July 30th, so more than two years after the closure?

17 A. Correct.

18 ATTORNEY McDONALD: All right, thank you. Going to
19 move on now to Exhibit B4, which I don't believe has been
20 admitted yet. Mr. Howe, can check me on that.

21 COURTROOM DEPUTY: Correct.

22 BY ATTORNEY McDONALD:

23 Q. Thank you very much. So could B4 please be published to
24 litigants, the Witness, and the Court? I'll give you a minute
25 to review that.

1 A. I have finished reading.

2 Q. And B4 is an email from Elizabeth Todd to Leslie DeMars.
3 Do you recall being shown this document at your deposition?

4 A. I believe so.

5 ATTORNEY McDONALD: I move for the admission of
6 Exhibit B, as in boy, 4.

7 THE COURT: Any objection?

8 ATTORNEY JONES: No objection.

9 THE COURT: Okay. B4 is admitted.

10 BY ATTORNEY McDONALD:

11 Q. This document is written by Beth Todd, and it is her
12 comments about David Seifer, correct?

13 A. Yes, correct.

14 Q. If I could have you read the first two sentences of the
15 first large paragraph.

16 A. "His clinical practice has deficits. He does not seem" --
17 oh, there we go -- "he does not always seem to make clinical
18 decisions based on recommended standard practices or with the
19 awareness of patient costs and convenience".

20 ATTORNEY McDONALD: Could I ask that this document be
21 published to the jury?

22 THE COURT: Yes.

23 THE WITNESS: Do you want me to read that again or
24 keep reading?

25 BY ATTORNEY McDONALD:

1 Q. That's good. Thank you.

2 A. Okay, yeah.

3 Q. Okay. So fair to say that this document is a complaint or
4 a criticism by Beth Todd about David Seifer; would you agree?

5 A. Yes.

6 Q. Okay. Do you know whether Beth Todd was terminated in
7 connection with the closure of the REI division?

8 A. She was not.

9 Q. Is she still employed at Dartmouth Health today, if you
10 know?

11 A. I think she is, but I'm not entirely sure.

12 Q. You can take that one down. You were here for Kelly
13 Mousley's testimony yesterday, correct?

14 A. Correct.

15 Q. Do you recall her testimony about her complaint about Dr.
16 Seifer?

17 A. I think so.

18 Q. I'll show. You

19 A. Not specifically.

20 Q. I'll ask you to take a look at B3, which has been
21 admitted, so I'll ask that it be published to the jury as well.

22 A. I have finished reading it.

23 Q. Thank you. Do you know whether Ms. Mousely faced any
24 adverse employment action as a result of her criticisms of Dr.
25 Seifer?

1 A. I don't believe so.

2 Q. And you heard her testify that she left Dartmouth Health
3 in 2020, I believe, correct?

4 A. Correct, yes.

5 Q. All right. You testified on this earlier, and I'm sorry.
6 This one can be taken down. Thank you.

7 Who is Heather Gunnell?

8 A. She was the director within the department of obstetrics
9 and gynecology, so the, the lead administrative person within
10 the department, a partner to the chair and reported to the vice
11 president for surgical and perioperative services, Daniel
12 Herrick.

13 Q. Could you please turn to or display, please, Plaintiff
14 Exhibit 20? And I don't believe this one has been admitted
15 yet. So, if this could just be published to the Court and the
16 litigants and the Witness.

17 Do you recall this document being a document you were
18 shown in your deposition?

19 A. Yes.

20 Q. And had you ever seen this document before July of 2019?

21 A. No, I had not.

22 ATTORNEY McDONALD: Move for the admission of
23 Plaintiff's Exhibit 20.

24 THE COURT: Any objection?

25 ATTORNEY JONES: None.

1 THE COURT: Okay. Plaintiff's Exhibit 20 is
2 admitted.

3 (Plaintiff Exhibit 20 is admitted into evidence.)

4 BY ATTORNEY McDONALD:

5 Q. I'll give you a minute to review.

6 A. Yeah, I've reviewed it.

7 Q. Okay.

8 A. Yes.

9 Q. How would you characterize this communication from Heather
10 Gunnell?

11 A. Troubling. Little regard for policy, procedures, and, in
12 some cases, legal restrictions, which is a alarming and
13 frustrating. It's a concerning communication.

14 Q. Do you know whether Ms. Gunnell faced any adverse
15 employment action in connection with her submission of this
16 report?

17 A. No.

18 Q. All right. Thank you. You can take that one down. The
19 documents that we just reviewed that pertained to complaints
20 about Dr. Seifer, had you seen any of those documents prior to
21 your deposition in 2019?

22 A. I had not.

23 Q. Thank you. Dr. Merrens, do you know if there was ever a
24 plan to reassign Dr. Porter to another department or division?

25 A. There was no plan.

1 Q. Do you know whether the OB/GYN department needed a
2 generalist in this timeframe?

3 A. I'm not sure I knew the needs of the department at this
4 time. I'm not sure what they were searching for at the time.

5 Q. Do you know whether Dr. Porter would have been an
6 appropriate candidate for a generalist position in the OB/GYN
7 department?

8 A. I don't think she has the -- well, she's in the
9 department. I think the generalist skills are different, and I
10 don't think her practice consists of the labor and delivery
11 work that the generalists are engaged in. But I, yeah, I know
12 she wasn't engaged in that work and they have different
13 privileges that they're engaged in doing.

14 Q. Do you know whether Dr. Porter's work had a particular
15 focus?

16 A. I think Dr. Porter's work was entirely focused around
17 reproductive endocrinology and infertility. I think her, and a
18 broad spectrum of that she was a surgeon who performed
19 surgeries to preserve the ability to become pregnant. She read
20 ultrasounds around, specifically around the female reproductive
21 tract. She performed intra, IVF. So her practice was
22 severalfold in, completely around reproductive endocrinology
23 and infertility.

24 Q. At the time you made the decision to close the REI
25 division, were you aware of Dr. Porter's desire to stay on at

1 Dartmouth Health in a nonfertility capacity?

2 A. I was not.

3 Q. Yesterday Mr. Jones showed you an email from Nurse
4 Maxfield, and that was Plaintiff's Exhibit 83. I believe that
5 that's been admitted as well. I'd ask that that be published.

6 COURTROOM DEPUTY: I don't have 83 as admitted.

7 ATTORNEY McDONALD: I apologize. Then just for the
8 litigant, the Witness, and the Court.

9 ATTORNEY NUNAN: Morgan, can we ask you to just speak
10 up, please?

11 BY ATTORNEY McDONALD: Yes, sorry.

12 Q. Okay. Do you have Plaintiff's Exhibit 83 in front of you?

13 A. Not on the screen.

14 ATTORNEY McDONALD: Can we ask that this be published
15 to the Witness?

16 COURTROOM DEPUTY: Yes. Apologies. That was
17 admitted.

18 ATTORNEY McDONALD: No worries.

19 BY ATTORNEY McDONALD:

20 Q. Perhaps you were shown another version of this Nurse
21 Maxfield email. Do you recall Mr. Jones raising the -- oh,
22 excuse me. Let me back up for a minute.

23 Do you recognize this as an email that you sent to
24 Victoria Maxfield in May of 2017?

25 A. Yes.

1 ATTORNEY McDONALD: Request that Plaintiff's Exhibit
2 83 be admitted.

3 THE COURT: Mr. Howe, are you saying it's already
4 admitted in evidence on your list?

5 COURTROOM DEPUTY: It is admitted.

6 THE COURT: It is admitted.

7 ATTORNEY McDONALD: Okay, thank you. All right. So,
8 if we could publish this one to the jury as well.

9 BY ATTORNEY McDONALD:

10 Q. And I believe there was some discussion yesterday about
11 your comment here that you're not sure of Dr. Porter's interest
12 in staying on if the infertility part were to cease. Do you
13 recall that?

14 A. I do.

15 Q. At the time you sent this email, did you have any
16 interest, any reason to believe that Dr. Porter had an interest
17 in staying on if the infertility part were to cease?

18 A. I did not.

19 Q. There's been testimony in evidence in this case about the
20 letter from Dr. Porter in which she expressed a desire to stay
21 on to do noninfertility work, and that's Plaintiff's Exhibit
22 101 which has already been admitted if we can put that on the
23 screen, publish to the jury. What's the date on this email?

24 A. May 25th 2017.

25 Q. So does that postdate the email that you sent to Nurse

1 Maxfield in which you indicated you were not aware of her
2 interest in staying on?

3 A. Correct. I'm not sure the date of that Maxfield. Was it
4 the 12th of May?

5 Q. Yes.

6 THE COURT: So, Ms. McDonald, I'm advised that that's
7 not in evidence.

8 ATTORNEY McDONALD: It's not? Is 101A in? Perhaps
9 there is a version of this letter in evidence.

10 COURTROOM DEPUTY: I don't believe so.

11 ATTORNEY McDONALD: No?

12 ATTORNEY JONES: For what it's worth, we believe that
13 101A was admitted. We had to add an email cover to resolve a
14 completeness concern, and then we believe it was admitted, and,
15 if not, we would have no objection. I think it's already in.

16 ATTORNEY McDONALD: My notes said 101A is in as well.

17 THE COURT: So then 101A is admitted.

18 BY ATTORNEY McDONALD:

19 Q. So, again, this letter postdated the email that you sent
20 to Nurse Maxfield, correct?

21 A. That's correct.

22 Q. Okay. Do you have a sense of how much of Dr. Porter's
23 practice related to reproductive health?

24 A. I don't think I had a good sense of how she apportioned
25 her time and the work she did. So I wouldn't say -- my sense

1 was that her entire effort was designed around reproductive
2 endocrinology and infertility. I think I was aware at the time
3 that she was not performing some of the more complex surgeries
4 but may have been in the process of doing that, and we heard
5 from Dr. Padin who proctored Dr. Porter in that. So I think
6 that my understanding is that the surgical, ultrasound, clinic,
7 IVF was all part of a REI doctor's work.

8 Q. And, at the time of the closure of the REI division, were
9 you aware of any open roles to which Dr. Porter could have been
10 reassigned?

11 A. I wasn't aware of open positions in the department or in
12 other areas. I think Dr. Porter had an appointment in the
13 department of radiology, meaning that she had an appointment in
14 two departments, but I believe Dr. Porter's expertise was
15 really around ultrasound of the female reproductive system.

16 The ultrasounds that are done in radiology are a wide
17 array of ultrasounds, testicular ultrasounds, liver, biliary
18 tract, vascular structures. So there was a wide range of
19 things, and I'm not sure how much that was part of her regular
20 work, although she did have an appointment there and was part
21 of that. But her practice, my understanding, was pretty
22 limited to a very important area but just around the female
23 reproductive tract.

24 Q. All right. Switching gears again and to return to some
25 comments that you made at the beginning of your testimony

1 today, why did you make the decision to close the REI division?

2 A. Because I thought that it could no longer continue in its
3 current form with the current people involved in it and
4 adequately serve our patients in the safe provision of care in
5 a coordinated fashion. I listened to the counsel of people
6 engaged and who had met with this group and, in the words of
7 people that have testified here, it was an unsalvageable
8 situation and one in which we didn't feel like we could
9 continue.

10 I made that decision solely, and it was a very difficult
11 decision but one in which I continue to stand by and even
12 after, and even in the setting of not having all the
13 information about things that had happened. And I think in
14 reflection what pains me most is that we have a really robust
15 way of sharing concerns about patients in our organization. We
16 have hotlines. We have confidential, you know, compliance
17 numbers. Every year we go through E-learning training where
18 we're reminded of reporting systems on our computers called
19 OWLs, occurrence with learning. I don't know how they came up
20 with it. But you can anonymously report something.

21 We had so many opportunities to say, Hey, we have a
22 problem here, and that could have come from anybody. It didn't
23 need to go to me. It needed to go somewhere. And what we've
24 heard is that -- and I'm sad that we didn't have an opportunity
25 to address that earlier on in terms of the context of what's

1 happened.

2 So we had lots of opportunities to broaden that, and even
3 from our discussion at the beginning, I had a relationship with
4 Dr. Porter, and she felt very comfortable reaching out to me,
5 and, you know, the incidents we're talking about, we had met in
6 2012 and 2013. Everything we're talking about started in 2013
7 and 2014 and 2015.

8 So I felt like, even on that level even though I was in a
9 different role, I felt like she could have reached out to me in
10 the context of what I think was a trusting relationship and
11 said, I'm really worried, and I, I felt sad mostly because of
12 that. And I'm totally reassured that we have not had any
13 claims or harm or things that have people come forward and
14 said, you know, We've had discussions of people concerned about
15 harm.

16 As a leader in the organization, I would have wanted to
17 know that much earlier on so we could make changes and not get
18 to a place at the end where a group of physicians can't work
19 with each other, can't hire nurses, can't maintain
20 collaborative care in a way that we value, and I had to end the
21 program.

22 Q. Thank you, Dr. Merrens. If you take a look at Plaintiff's
23 Exhibit 103, which was admitted yesterday, if we could put that
24 on the screen and publish it to the jury.

25 Do you recall Mr. Jones asking you about a comment you

1 made to Vermont Public Radio?

2 A. I do.

3 Q. Did Vermont Public Radio ever retract statements that you
4 made?

5 A. Yes.

6 Q. Excuse me. That they allege that you made?

7 A. They retracted the, they retracted, and, yes, they
8 retracted and apologized for attributing a statement to me that
9 I never made.

10 Q. And they acknowledged that they had attributed a statement
11 to you that you had never made?

12 A. That's correct.

13 Q. Thank you. We can take that one down. Thank you. We've
14 heard you and others who have testified in this trial use the
15 word "dysfunction" to describe the REI division. What does
16 that word mean to you?

17 A. I think it means, it really describes a group.
18 Dysfunction is not about a person. It's really, I think, about
19 it in the context of a group, and I framed this as a team and
20 how nurses need to work with doctors and all the other people
21 need to -- there's so many critical components, and I think, if
22 anything, we've all learned a lot about how reproductive
23 endocrinology works.

24 The important role of the lab person behind the door and
25 the nurse that does insemination and how things work is really

1 a team, and sometimes the team can have the right components
2 but doesn't work well together, even talented people but
3 doesn't work well together, and not working well together is,
4 Hey, we've got to work on it and fix it or not.

5 And, from my perspective, the word "dysfunction" describes
6 a team that cannot work within itself, can't agree on things,
7 doesn't have trust in each other, doesn't respect each other,
8 doesn't want to help the other members, and that changes the
9 nature of how care is provided.

10 We know, when there's a high degree of variation or a
11 fractured team, they can't provide the same kind of care, and
12 we develop silos of care and nurses on teams and aligned with
13 one person, and that's just not the best thing. So that's the
14 dysfunction I'm speaking to.

15 Q. In your mind, is there any connection between the nursing
16 shortages or the failure to recruit and retain nurses and the
17 dysfunction that you just described?

18 A. In my mind, they're inexorably linked. I think people
19 come into an area and are, like, Wow, this is a great team to
20 work with. I'm going to tell other people, and/or not, or get
21 a sense that, Boy, it's hard to kind of get things done.
22 There's nurses and other people that work on teams. You know,
23 they're infighting.

24 This happens in everything, everything we do, lots of
25 other jobs. You know, you have great restaurants with

1 incredible chefs, and they may be talented, but they're
2 impossible to work with or can't work with each other. They
3 can't hire people to work in the restaurant. It's same in
4 health care. People who work there want to be part of a team,
5 and I think we were unable to recruit people to be part of
6 these teams because it was not a team.

7 Q. I'll ask you to take a look at Plaintiff's Exhibit 84.
8 I'm not sure whether this one has been admitted. Not admitted.
9 Thank you. So I'll ask that one just be published to the
10 Witness, the Court, and the litigants. I'll give you a moment
11 to review that, Dr. Merrens.

12 A. I've read this.

13 Q. Do you recognize this document?

14 A. Yes.

15 Q. And is this an email Daniel Herrick sent you on May 12,
16 2017?

17 A. Correct.

18 ATTORNEY McDONALD: Move for the admission of
19 Plaintiff's Exhibit 84.

20 THE COURT: Any objection?

21 ATTORNEY JONES: No objection.

22 THE COURT: Plaintiff's 84 is admitted.

23 (Plaintiff Exhibit 84 is admitted into evidence.)

24 BY ATTORNEY McDONALD:

25 Q. I'll draw your attention to the second sentence in

1 Mr. Herrick's email, "Based on my observation and interaction"
2 -- oh, and I'm sorry. Could this be published to the jury?

3 "Based on my observations and interactions, Misty has been
4 the biggest driver to the dysfunction within REI". Did you
5 have any understanding as to what Mr. Herrick meant when he
6 said that?

7 A. I think he's reflecting after, after taking a bigger, a
8 deeper dive through the Value Institute work and having other
9 discussions. I don't think the email outlines the specifics.
10 It does come on the heels of a fair amount -- and I mentioned
11 it below -- with a lot of, with a number of emails -- and I
12 think we discussed this yesterday -- talking about a lot of the
13 other things that Dr. Porter did, which I think really further
14 made it very clear in my mind that she did a lot of things all
15 in the context of REI, surgery, ultrasounds. Her work were all
16 within the context of that.

17 And I appreciated the people's input and what they were
18 saying. Daniel had a different perspective after, after being
19 very much involved in it and seeing, at the physician level,
20 how they interact, interacting with the director about how
21 things work, seeing how challenging it was to schedule patients
22 or understand schedules or to have communications or be able to
23 come to meetings or be able to kind of -- I think he began to
24 understand some of the dynamics. This was his description.
25 This was his summary.

1 Q. And taking a look at the next sentence, which is, "The
2 personal relationship that Leslie has with Misty contributed
3 significantly to this not being addressed in an appropriate and
4 timely manner", did I read that correctly?

5 A. Yeah. Yes.

6 Q. Do you have any understanding of what Mr. Herrick meant by
7 that?

8 A. I think the relationship between these two physicians is
9 complex, probably the most complex that you can imagine. They
10 both trained at UVM then came to Dartmouth. They were friends.
11 They shared time with family. One was a patient of the other.
12 You know, in many instances there were so many conflicts of
13 interest and clouding of judgment that, at this point, you
14 know, this was one of the reasons that I had a hard time really
15 understanding kind of what Leslie's, Dr. DeMars's perspective
16 was on this because it was so complicated.

17 So I don't know what Dr. DeMars's decision making was in
18 the process, but it certainly contributed to this dysfunction,
19 and when I include, when I describe dysfunction, again, not a
20 person. Dr. DeMars was part of this dysfunction, maybe for
21 some of these same reasons.

22 Q. Understood. You can take that one down.

23 ATTORNEY McDONALD: Your Honor, did I already move
24 for admission of that one? I did? Great, thank you.

25 BY ATTORNEY McDONALD:

1 Q. Did Dr. Porter's disability play into your decision to
2 terminate her employment in connection with the closure of the
3 REI division?

4 A. Absolutely not.

5 Q. At the time you made the decision, did you even know what
6 her disability was?

7 A. I did not.

8 Q. Did you hear Michelle Russell's testimony in this trial
9 about a meeting in which you made comments to the OB/GYN
10 department in an auditorium related to the closure of the REI
11 division?

12 A. I did.

13 Q. Do you recall the meeting that Dr. Russell was referring
14 to?

15 A. I do.

16 Q. How many people attended that?

17 A. Well, it was kind of two adjoining conference rooms, so a
18 room about this size, maybe a little smaller. So there might
19 have been 30, 40 people in that room, maybe more.

20 Q. Do you recall whether Dr. Russell asked about Dr. Porter?

21 A. I don't remember.

22 Q. Do you recall saying anything about Dr. Porter's
23 disability in that auditorium?

24 A. I wouldn't. I would have never said anything about her
25 disability in a large meeting with the department. I did not.

1 Q. Thank you. In connection with the decision to close the
2 REI division, were the patients notified of what was happening?

3 A. My understanding is that the decision to close and the
4 timing of the closure would impact a number of patients that
5 were expecting to have, to go on medication, to have
6 procedures, to have a range of things, and, following the
7 announcement of the closure, I think the staff and the
8 department worked to contact people over the phone and to send
9 people letters and contact people as best as possible.

10 I don't know to what extent. I don't think it was
11 everyone who had ever been seen in reproductive endocrinology
12 and infertility, but probably the people that had upcoming
13 appointments or had been engaged, maybe even people that were
14 expecting to have an appointment. So I think there was that
15 effort on a person-to-person basis.

16 Q. And were there any efforts made to assist these patients
17 with getting transferred to other facilities?

18 A. So part of the plan was to do a number of things. We had
19 made contact with a number of other infertility, REI and
20 infertility centers across New England including UVM, Baystate,
21 Tufts, and maybe some place, some other places around our
22 closure and that our patients may need care, services and
23 coordination. I think our plan would be that we would continue
24 to maintain -- and we do it to this day. We have a freezer
25 that has all the eggs, embryos, and sperm maintained, and we

1 would work to transfer, as needed, if people had samples.

2 We would work with patients. In some instances, we had
3 patients that had specific insurance that was covered and
4 noncovered. We made sure that our employees were able to have
5 Tier I coverage for their care in Vermont and come to UVM as if
6 they were coming to Dartmouth. So we made it pretty clear
7 about this and worked to develop, worked to help patients with
8 that.

9 Q. I think I heard a mention that the lab remained open.
10 Does the lab, is the lab still, is it open today?

11 A. We still have the freezer, and the lab does do some
12 things. It's obviously not in the process of collecting eggs
13 and that, but we have everything stored really in perpetuity in
14 terms of patients' needs. I mean, that's, those things, the
15 sperm, egg, whatever is in there is in there and can be
16 transferred and used.

17 Q. And is that at a cost to Dartmouth Health?

18 A. Yes.

19 Q. Does Dartmouth Health refer patients to Dr. Porter?

20 A. Yes.

21 Q. With what frequency?

22 A. I think it depends. So there is -- what we know is that,
23 if we look back over the past couple of years, what I've
24 described in terms of kind of people needing IVF, there's
25 probably about 550 referrals we've made over the past two years

1 for in vitro fertilization. The majority of those have gone to
2 our partner, Boston IVF, about 60 percent. About 20 percent
3 have gone to other New England -- there are other IVF centers,
4 and then about 11 percent have been referred to UVM to Dr.
5 Porter and ostensibly her colleagues.

6 This is a mixture of insurance coverage wouldn't cover
7 going to Boston IVF, which has become our partner as it relates
8 to REI- and IVF-related work, and also, frankly, we have a huge
9 catchment area, and there are women and couples who it is more
10 convenient to come to Burlington than it is to go down to
11 Boston. So we've done that.

12 I think there are also case in which complex surgeries
13 that can't be done by members of our team have been referred to
14 Dr. Porter, but, for the most part, those are completed by our
15 surgeons, both in our community group practices which are the
16 southern part of New Hampshire that Maria Padin oversees or in
17 Lebanon. So yes.

18 Q. Has the Dartmouth Health REI division reopened in the
19 nearly eight years since it closed?

20 A. It has not.

21 Q. Are there any plans to reopen it at this time?

22 A. There are no plans at this time. I mean, I think what
23 we've done and we said is that we will ensure patients' access
24 to these services. So and it's not just patients. I think
25 that we've been really committed to resident education, and I

1 think what we've had has been a, you know, our residents in
2 other areas travel to get other experiences. And, although we
3 would love to be able to do everything in Lebanon, we can't.
4 We send residents to Maryland shock trauma to see those kinds
5 of things, and we have experiences all across the country for
6 residents to be part of.

7 With the ending of the program, we made opportunities for
8 them to work with Boston IVF, for people to come to the Lebanon
9 campus to teach the residents, and residents come up here to
10 UVM. There's no question. We've actually had a really long
11 and robust relationship with UVM around training, and I think
12 it's actually one of our strengths.

13 I mean as an executive, I meet with Sunny Eappen, the
14 president of UVM Health System, on a regular basis, and we
15 share a lot. I actually worked with Dr. Porter years ago when
16 the entire, I think the entire REI program decided to become
17 private and left a fellow hanging, and we arranged to bring the
18 fellow down to Dartmouth. I collaborated with to ensure that
19 we could do that.

20 So we want to avail our residents of the best experience,
21 and that has not been something that has been altered by the
22 closing of the program or the proceedings that we're engaged in
23 now. I think we've got a really robust ability to train
24 residents, and, where appropriate, Dr. Porter and her
25 colleagues at UVM are certainly a part of it.

1 Q. As you sit here today kind of looking back on the decision
2 to close the REI division, do you feel that it was the correct
3 decision?

4 A. Absolutely.

5 Q. Do you feel that the decision to include Dr. Porter in the
6 terminations associated with that REI division was the correct
7 decision?

8 A. Yes. I think, you know, this is -- made the decision to
9 terminate three physicians as part of this program, and Dr.
10 Porter was one of them, and I stand by that, that decision. I
11 own that decision. I made that decision, and, to this day, I
12 think it was the right decision.

13 ATTORNEY McDONALD: Thank you, Dr. Merrens. If I
14 could just have one moment.

15 THE COURT: Yes.

16 ATTORNEY McDONALD: Nothing further at this time.
17 Thank you.

18 THE COURT: So before cross-examination I'm just
19 going to step off the bench for just a moment. I'll ask the
20 jurors remain in place, but feel free to stand up to stretch
21 your legs.

22 (Brief pause.)

23 THE COURT: Okay. Cross-examination?

24 ATTORNEY JONES: Yes, Your Honor.

25

1 CROSS-EXAMINATION BY ATTORNEY JONES

2 Q. Good morning, Dr. Merrens.

3 A. Good morning.

4 Q. In the beginning of your examination by Ms. McDonald this
5 morning, you were discussing the situation at the end of 2012
6 regarding some issues between Dr. Porter and Dr. Reindollar.

7 Do you recall that testimony?

8 A. Correct, yes.

9 Q. Isn't it true that part of what was going on at that time
10 was that all of the division heads in OB/GYN had come to you to
11 express concern about Dr. Reindollar?

12 A. That is not the case.

13 Q. That's not the case? Isn't it true that four nurses had
14 gone to HR to complain about sexual jokes and sexism from
15 Dr. Reindollar?

16 A. I'm not aware of that.

17 Q. Okay. Do you recall that Dr. Porter, part of her concern
18 was that she was supporting the nursing staff in having their
19 concerns addressed?

20 A. I can't remember the specifics, but I clearly understood
21 that Dr. Porter was representing, that she was struggling with
22 Dr. Reindollar for a variety of reasons, and I took that very
23 seriously. I don't recall discussions, her representing nurses
24 or other things. There were a variety of things that were
25 happening, and her, I think it was more centered around the

1 relationship that she had with her chair and concerns that she
2 had.

3 Q. And one of those concerns we saw in one of the emails was
4 that she felt that she was bullied by Dr. Reindollar, correct?

5 A. I think that was in one of the emails.

6 Q. But you don't recall her also expressing concern about
7 Dr. Reindollar's treatment of staff?

8 A. I actually don't.

9 Q. I want, I'm going to pull up, or my colleagues are going
10 to call up Exhibit D, which Ms. McDonald asked you about. And
11 if we can go to Page 3, so D3, thank you. And if you see at
12 the bottom there the email that starts, "Dear Mr. Weston and
13 Dr. Merrens", in the second paragraph that's titled "Scope", do
14 you see that?

15 A. Yes.

16 Q. And it refers to, "The purposes of the mediation are to
17 improve the working relationship between Dr. Reindollar and me
18 and to improve the working relationship between Dr. Reindollar
19 and staff". Do you see that?

20 A. I do.

21 Q. So, I mean, at least Dr. Porter, at this time, was
22 including issues involving the work relationship between
23 Dr. Reindollar and staff as part of the issues to be discussed,
24 correct?

25 A. I think it's a pretty broad scope and statement. I think

1 what I respected in Dr. Porter's discussion at the time was
2 concern for herself but also concern for, you know, her working
3 relationship with this chair, and I think there's, I think
4 that's -- you know, when you think about we spoke earlier, this
5 is a team sport, and I think, you know, if there is discussions
6 that need to happen, I'm all for that.

7 Q. Okay. Now, you provided some testimony about the
8 severance offer that was made to Dr. Porter. Do you recall
9 that?

10 A. I do.

11 Q. Isn't it true that part of a severance agreement is that
12 Dr. Porter would have to release all of her claims against
13 Dartmouth Health?

14 A. I think that's a typical requirement in severance in
15 organizations and was not particular to Dr. Porter. It happens
16 in all severance.

17 Q. Right. And also what happens in all severance is
18 confidentiality clauses, correct?

19 A. Correct.

20 Q. Okay. So --

21 A. I actually can't speak to the legal nature of what was
22 offered.

23 Q. Okay. But it's not as if Dartmouth Health was just
24 offering Dr. Porter six or nine months of a severance payment;
25 that was, there were strings attached. She would have to waive

1 all of her claims to sue the organization?

2 A. I'm not an attorney, and nor, and we have normal processes
3 about how we offer severance and people that leave the
4 organization.

5 Q. Right. Actually, you testified a second ago it's normal
6 that these would include release of claims.

7 A. I think whatever was offered to Dr. Porter would be the
8 same that we offer for anyone that we provide severance. It
9 was the same for Dr. Hsu and Dr. Seifer.

10 Q. Now, with regard to, again, you testified during your
11 testimony this morning about the nursing shortage issue.
12 Again, though, you were here when Nurse Sharon Parent testified
13 that she was willing and able to continue providing nursing
14 services to REI, correct?

15 A. Correct.

16 Q. And you testified yesterday that you have no reason to
17 doubt her testimony?

18 A. I have no reason to doubt that she said that. She was
19 interested in coming back and in some fashion. That was her
20 testimony.

21 Q. You also testified that, as part of the package that you
22 were offering to Drs. Hsu and Seifer when you met with them
23 about the closure, that you would offer outplacement services
24 to -- I think I got this right -- to help them find employment.
25 So Dartmouth Health was helping Dr. Hsu and Dr. Seifer find

1 employment, correct?

2 A. I think that was an option. If they wanted that, it was
3 something that HR would help them with. It was not something
4 that I was overseeing.

5 Q. Are you aware of whether or not anybody from Dartmouth
6 Health wrote letters of recommendation for either of them?

7 A. I do not know.

8 Q. You testified that Dr. Hsu is currently working at the
9 University of Cincinnati?

10 A. That's my understanding.

11 Q. Do you know whether or not he went to University of
12 Missouri first?

13 A. I don't know.

14 Q. You don't know that? Okay. So you don't have any
15 knowledge about the -- you don't have knowledge of the
16 circumstances under which that program closed?

17 ATTORNEY McDONALD: Objection. Assumes facts not in
18 evidence.

19 THE COURT: Overruled.

20 THE WITNESS: I have, I have no idea about things
21 that happened at other places.

22 BY ATTORNEY JONES;

23 Q. You testified also that Dr. Seifer went to Yale, correct?

24 A. He's currently at Yale.

25 Q. And what's the basis of your knowledge?

1 A. I think, if you -- I think I was just aware of it. If you
2 look up Dr. Seifer on Yale's women's health website, he comes
3 up as a physician in that program.

4 Q. Okay. And are you aware that, after he arrived at Yale,
5 that physicians have left the REI program?

6 A. I'm not aware of anything that happened at other programs.
7 I was referring to current employment.

8 Q. So do you have any knowledge of the fact that, after Dr.
9 Seifer joined Yale, there was significant litigation by
10 patients arising from the REI care at Yale?

11 A. I'm not aware of anything regarding his work.

12 ATTORNEY JONES: May I have one moment?

13 THE COURT: Yes.

14 BY ATTORNEY JONES:

15 Q. Dr. Merrens, you were testifying towards the end of your
16 testimony this morning about issues regarding the impact of the
17 closure of REI on patients, and you covered issues such as
18 notice to patients and what you, what the former patients are
19 now able to do in terms of alternate services. Do you recall
20 that testimony?

21 A. I do.

22 Q. I'd like to show you a document that has not yet been
23 admitted into evidence. It's Plaintiff's Exhibit 80. So, if
24 we could have this on the witness, judge, and litigants'
25 screens. Apparently, we need a moment. Well, perhaps, while

1 we're working on the technical issues, I can establish some
2 foundation. Actually, here it is.

3 THE COURT: Okay.

4 BY ATTORNEY JONES:

5 Q. Doctor Merrens, I'm directing your attention to the
6 monitor. We've placed an exhibit marked Plaintiff's Exhibit
7 80. Do you recognize this document?

8 A. Well, it's a partial document. I see the top page.

9 Q. Okay, fair enough. It begins with an email to you dated
10 May 11th 2017. Do you see that at the bottom of Page 1?

11 A. I see part of it.

12 Q. Yeah. And we can scroll down to complete it so you can
13 see the rest of it.

14 A. Do you want me to read it?

15 Q. I don't want you to read it, no. I just want -- we're
16 just trying to identify what the document is before we get into
17 the actual substance.

18 ATTORNEY McDONALD: Counsel, can you give him an
19 opportunity to read it?

20 BY ATTORNEY JONES:

21 Q. Yeah, take the time to read it if you want. I'm not
22 asking you to read it out loud at this time.

23 A. I'm just not sure what you're asking me.

24 Q. How about take your time, read the document, and let me
25 know when you get a chance.

1 ATTORNEY NUNAN: Excuse me. There should be a
2 notebook there with a paper copy in it.

3 THE WITNESS: What document is this?

4 ATTORNEY NUNAN: 80.

5 THE WITNESS: I've completed reading the email.

6 BY ATTORNEY JONES:

7 Q. Thank you. Is it fair to characterize this as starting as
8 an email to you from a patient of the former REI clinic?

9 A. Correct.

10 Q. And then you forward it on to somebody named Victoria
11 McCandless?

12 A. Yes.

13 Q. And who is Ms. McCandless?

14 A. I'm actually, I am not sure if Victoria was in HR. I'm
15 not sure where Victoria was, actually. I apologize.

16 Q. That's no problem. But so the initial patient email was
17 dated May 11th --

18 A. Correct.

19 Q. -- of 2017?

20 A. Yeah.

21 Q. You forward it to Ms. McCandless on May 11th as well?

22 A. Yeah.

23 Q. And then it looks like you then forward it again on May
24 12th and you include other people besides Ms. McCandless. Do
25 you see that?

1 A. I think what happened in the in between is that I asked
2 for some help in responding. This is a tragic email.

3 Q. Sure.

4 A. This is someone who is our employee and is reaching out,
5 and there are some sad parts to this.

6 Q. No, I understand.

7 A. And what I'm trying to say --

8 THE COURT: So, Dr. Merrens, before you speak further
9 about this exhibit, I think Mr. Jones is going to be eventually
10 seeking its admission.

11 BY ATTORNEY JONES:

12 Q. Exactly. You, in fact, received the email and then
13 forwarded it to the other people in the chain, correct?

14 A. I asked for help in how I might best respond.

15 ATTORNEY JONES: Got it. Now I'd like to move the
16 admission of Plaintiff's 80.

17 THE COURT: Any objection?

18 ATTORNEY McDONALD: No objection, subject to, I
19 believe, some redactions need to be made. There's a patient
20 name in this email.

21 ATTORNEY JONES: It's been redacted.

22 ATTORNEY McDONALD: The version on my screen I see a
23 name, unless that's not a patient name.

24 ATTORNEY JONES: No. If you scroll down to the
25 bottom -- there you go. And then, if you scroll to the

1 beginning to the very end of that email --

2 THE WITNESS: I think there's a name.

3 ATTORNEY McDONALD: There is, yes, in the middle of
4 the page attached to the draft response to the name.

5 ATTORNEY JONES: Can I speak with Ms. McDonald?

6 THE COURT: Of course.

7 ATTORNEY NUNAN: I just redacted it.

8 THE COURT: Okay. It's been redacted, so no
9 objection?

10 ATTORNEY McDONALD: No objection.

11 THE COURT: Okay. Then Plaintiff's 80 is admitted.

12 ATTORNEY JONES: And may we publish it to the jury?

13 THE COURT: Yes.

14 BY ATTORNEY VITT:

15 Q. So, Dr. Merrens, you described this as a tragic email.
16 This is basically from a patient who is distressed about what's
17 going to happen with her REI care now that the REI division has
18 been closed, correct?

19 A. Correct.

20 Q. And she starts off by expressing that it was distressing
21 that she didn't get notice from the hospital and she had to
22 learn -- she states in the third line on Page 2, "I had to find
23 out on the radio on my way to work that the REI clinic was
24 closing May 31st". You see that?

25 A. That's what she says.

1 Q. Yeah.

2 A. It wasn't the intent. I mean, the goal was to contact
3 everyone. Could everyone be contacted? She clearly had been
4 in touch through this with her physician, so her physician had
5 gotten in touch with her, and it says, you know, she got in
6 touch with her physician, Dr. Hsu, and I realize it was at this
7 time that he had also been terminated. So he directed her to
8 contact us. So she had some contact, but, you know, I can only
9 imagine not everyone could be contacted in a timely fashion.

10 THE COURT: So, Dr. Merrens, this is
11 cross-examination. I'll direct you to answer the question
12 asked. Your attorney will have an opportunity to speak with
13 you again.

14 THE WITNESS: Yes, Your Honor.

15 BY ATTORNEY JONES:

16 Q. And, Dr. Merrens, in addition to her concern about not
17 receiving what she believed was adequate notice, I mean, that
18 it actually has an impact on her ability to receive adequate
19 REI care, correct?

20 A. No.

21 Q. Well, she, if she is in midcycle and she needs to complete
22 services at a very specific time, that can impact her care,
23 correct?

24 A. I'm not sure of the plans that were provided her in
25 follow-up. I'm not sure if we said, We can get you in to be

1 seen at one of the other centers that we had contacted in
2 advance to make sure. So I don't know the outcome of this. I
3 say it's tragic because, yes, the ending of a program disrupts
4 things that are going on like this, but it was necessary.

5 Q. She states just two lines below the one we just read, she
6 says, "I have been waiting a long time to finally have the
7 chance to become a mother, and now the opportunity is just
8 taken away without notice".

9 So she felt that her opportunity to become a mother had
10 been taken away. You see that?

11 ATTORNEY McDONALD: Objection.

12 ATTORNEY JONES: Isn't that what she says?

13 THE COURT: Overruled.

14 THE WITNESS: That is what she says. What we don't
15 have is the follow-up that was provided to her around next
16 steps, and that's not included in this.

17 BY ATTORNEY JONES:

18 Q. Well, and your lawyer can get into that if she wants to.
19 There were other patients who wrote to you with similar
20 concerns, correct?

21 A. There were some.

22 Q. Excuse me.

23 A. Yes.

24 Q. Okay. I'd like to show you what's been marked but not
25 admitted yet as Exhibit 71. And, again, I'd ask that this be

1 shown on the witness, judge, and litigant screens. And can you
2 let me know when you've had a chance to read that?

3 A. I've read the email.

4 Q. And is it, in fact, an email that another patient sent to
5 you on May 9th 2017?

6 A. That is correct.

7 Q. And you, in fact, received it?

8 A. Correct.

9 ATTORNEY JONES: Your Honor, we would move the
10 admission of Plaintiff's 71.

11 THE COURT: Any objection?

12 ATTORNEY McDONALD: No objection.

13 THE COURT: Plaintiff's 71 is admitted.

14 ATTORNEY JONES: I'd ask that the exhibit be
15 published to the jury.

16 THE COURT: Yes.

17 BY ATTORNEY JONES:

18 Q. So, Dr. Merrens, is it fair to characterize this as
19 another distressed patient contacting you?

20 A. Yes.

21 Q. And she expresses, "I feel that you need to hear the
22 patient's perspective, and I'm still looking for answers", at
23 the end of the first paragraph. Do you see that?

24 A. I do.

25 Q. And, if you go down to the paragraph that starts, "The

1 frustration abounds for me with this interruption and
2 inconvenience". Then she states, "But my bigger concern is the
3 fact that I'm being forced to transfer my embryo out of the
4 facility which increases its chance of death". Do you see
5 that?

6 A. I do.

7 Q. That's a pretty distressing place for a patient to be,
8 correct?

9 A. Correct.

10 Q. But you understand that patients like this patient were in
11 that position when they received notice that the REI was
12 closing?

13 A. I fully understood that there would be patients whose
14 lives would be disrupted because of this change. And I
15 accepted that.

16 Q. And that the transfer of some patients' embryos would risk
17 the viability of those embryos?

18 A. Correct.

19 Q. I'd like to now show you what we've marked as Exhibit 73.
20 Again, not yet admitted into evidence so we should have limited
21 publication at this time. Is that on your screen, Dr. Merrens,
22 or in front of you, whichever you prefer? But, if you can just
23 read it and let me know when you've had a chance to read it.

24 A. I've completed reading the document.

25 Q. Okay, thank you. And is this another email from a patient

1 to you that you received?

2 A. Yes.

3 Q. And it's dated May 10, 2017; is that correct?

4 A. Yes, that's correct.

5 ATTORNEY JONES: Your Honor, I move the admission of
6 Plaintiff's 73.

7 THE COURT: Any objection?

8 ATTORNEY McDONALD: No objection.

9 THE COURT: Plaintiff's 73 is admitted.

10 ATTORNEY JONES: And I'll ask that it be published to
11 the jury.

12 THE COURT: Yes.

13 BY ATTORNEY JONES:

14 Q. So, Dr. Merrens, again, is it fair to characterize this as
15 yet another example of a patient expressing distress at the
16 closure of the REI?

17 A. I believe so.

18 Q. And, if we turn to Page 2 of the exhibit, you know, the
19 text that she actually has in bold, I'll start a little
20 earlier. She says, "It is now May. I'm about a week into my
21 second IVF cycle with my egg retrieval due next week. I am
22 now, as a result of the imminent closure of the fertility
23 center, faced with the very real possibility that I will be
24 unable to conceive a child". You see that she says that?

25 A. I do.

1 Q. And -- well, strike that. The next highlighted section
2 she says, "However, I am now going to lose all future potential
3 beyond this treatment cycle because I cannot conceivably travel
4 to the next closest IVF clinic to receive treatment while
5 working due to time commitments needed for each cycle". Do you
6 see that?

7 A. I do.

8 Q. So for this patient it was not at all convenient for her
9 to go to Boston IVF or to UVM, correct?

10 A. Correct.

11 Q. And, in fact, it was so inconvenient that there was a real
12 possibility that she would not be able to continue with her IVF
13 efforts, correct?

14 A. That's correct.

15 Q. And then the final bold sentence of that paragraph, "This
16 abrupt closure is minimally anxiety producing during a time
17 when I need to keep my stress as low as possible."

18 You can understand her stress at this situation, can't
19 you?

20 A. I can.

21 Q. All right, thank you. When you were describing in
22 response to some of Ms. McDonald's questions about the reasons
23 you felt it was necessary to close the REI, you referred to you
24 felt that the circumstances at that time, if I got this right,
25 prevented DH from being able to provide safe and effective care

1 in the REI unit. Is that basically what you were saying?

2 A. Effective, yeah, that we couldn't provide the service
3 effectively.

4 Q. I think you used the word "safely" too. Is that correct?

5 A. I think what I said was that any team that isn't
6 coordinated and can hire people to be able to be involved in it
7 can't provide safe or effective care. That would be my
8 statement.

9 Q. And safe and effective care is essential at a hospital,
10 correct?

11 A. Yes.

12 Q. Now, you're the chief clinical officer of Dartmouth
13 Health, correct?

14 Q. Correct.

15 Q. That's a C-level executive position, correct, C-suite
16 level?

17 A. Yeah.

18 Q. And you've been involved in this case since it was
19 started?

20 A. Correct.

21 Q. And you've reviewed the evidence in the case?

22 A. Yes.

23 Q. And you're aware that this case includes evidence from Dr.
24 Porter and other witnesses regarding actual patient harassment
25 caused by Dr. Hsu and Dr. Seifer, correct?

1 A. I was aware at the time of my deposition that those
2 allegations had been made and those concerns had been raised.
3 I was not aware of any of that at the time of closure of the
4 program.

5 Q. Understood. But you became aware of that throughout the
6 course of the litigation, correct?

7 A. Correct.

8 Q. And that includes reports of patient harm from Dr. Porter,
9 Dr. McCallum, Dr. George, Dr. Baker, Nurse Parent, stenographer
10 Denise Gonyea and Dr. McGee, right? McBean.

11 A. I would agree that those people all expressed their
12 concerns. They were never raised through the normal channels
13 of how we might understand concerns about quality or the safe
14 delivery of care, and I never was made aware of that, nor was
15 our quality team or the other people involved.

16 Q. At the time of the decision?

17 A. Correct.

18 Q. But, throughout the course of this litigation, you have
19 become aware of that?

20 A. I have heard the testimony and read the documents, yes.

21 Q. Okay. And you understand that evidence and Dartmouth
22 Health's positions in this case, correct?

23 A. Yes.

24 Q. As chief clinical officer, do you deny that Dr. Hsu and
25 Dr. Seifer caused actual patient harm?

1 ATTORNEY McDONALD: Objection.

2 THE WITNESS: I'm not aware of actual harm. I'm
3 aware of concerns. I'm aware of people's testimony of what
4 they saw, but I'm not aware of actual harm.

5 BY ATTORNEY JONES:

6 Q. So are you denying that actual harm occurred?

7 A. I am saying that I'm not aware that harm, harm occurred.
8 I have read testimony and heard testimony about people's
9 concern that harm occurred, but I'm not -- we would have to do
10 a full investigation. We'd have to do -- we'd have to really
11 understand what happened at the time and in the moment to
12 determine whether harm occurred.

13 Q. In the eight years that this case has been pending and in
14 litigation and that you have received these complaints, you did
15 not initiate an investigation?

16 A. We terminated the entire division and the people that were
17 responsible for the care. I think that is the ultimate
18 expression of that I was not happy even in the, even not
19 knowing this information that this team could not continue
20 coordinated and effective care. So we did not undergo an
21 investigation because these, these claims were only -- I only
22 was, I was only apprised of them two years later.

23 Q. But they were troubling claims, correct?

24 A. I think what was, what I was apprised of at my deposition
25 in 2019 was concerning.

1 Q. Yeah. And, if, in fact, the information you were getting
2 was correct, then that would mean that patients had been
3 harmed, correct?

4 ATTORNEY McDONALD: Objection, asked and answered.

5 THE COURT: The question has been answered, I
6 believe.

7 BY ATTORNEY JONES:

8 Q. Okay. You testified that -- well, in your testimony this
9 morning, you characterized Dr. Porter's relationship with
10 Dr. DeMars as being friendly. Do you remember that?

11 A. I said they were friends.

12 Q. Yeah. You were here when we introduced an email in which
13 Dr. DeMars expresses that her life would have been easier if
14 Dr. Porter had lost her license. Do you recall that email?

15 A. I do.

16 Q. And you were here when Dr. DeMars herself on the stand
17 read that email and, when asked whether that was how she felt,
18 she said "yes". Do you think friends wish for the loss of
19 professional licensure of their friends?

20 A. I think she made a statement in an email. I, it wasn't my
21 statement. That's her statement about things. But I think
22 there have been other things that have been shared in the
23 process of this trial in which their friendship over the years
24 was well demonstrated.

25 Q. That statement was not a friendly statement, was it?

1 A. No.

2 Q. When you think of your friends, can you imagine wishing
3 that one of them lost their professional license?

4 A. Again, this was her statement. I don't think it has any
5 bearing on the fact that she described a robust relationship
6 with Dr. Porter for years leading up to this, including
7 conceiving a child.

8 ATTORNEY JONES: No further questions.

9 THE COURT: Any redirect?

10 ATTORNEY McDONALD: No, nothing. Thank you.

11 THE COURT: Okay. Thank you, Dr. Merrens. So it's
12 12:00 o'clock.

13 ATTORNEY SCHROEDER: Yes, it is.

14 THE COURT: Mr. Schroeder, you're standing. Is there
15 a question, or did you just want to go to lunch?

16 ATTORNEY SCHROEDER: No, I thought I was going
17 introduce the next witness, but I also thought you might look
18 at your watch and talk about the time.

19 THE COURT: Okay. So we'll take our lunch break, and
20 we'll be ready to go at 1:00.

21 (A recess was taken from 12:00 p.m. to 1:03 p.m.)

22 THE COURT: So, with some of the discussion this
23 morning about patient names and redactions, I just wanted to
24 point out, actually, the deputy clerk noticed the exhibit list.
25 The second updated exhibit list, Document 250 lists patient

1 names, and that's filed on the docket, several entries. So you
2 should file something that requests to file a redacted, same
3 document just with redacting those names. It's last names in
4 there, so I just want to bring that to your attention.

5 ATTORNEY JONES: Thank you. We'll take care of that.

6 THE COURT: Anything else before we bring the jury
7 in?

8 (The Jury enters the courtroom.)

9 THE COURT: Okay. Defendant may call its next
10 witness.

11 ATTORNEY SCHROEDER: Thank you, Your Honor.
12 Dartmouth Health calls Daniel Herrick, if I may go get him.

13 THE COURT: Yes.

14 Daniel Herrick,
15 having been duly sworn to tell the truth,
16 testifies as follows:

17 THE COURT: Mr. Herrick, if you could just maybe pull
18 the microphone little closer to your mouth. Thank you.

19 DIRECT EXAMINATION BY ATTORNEY SCHROEDER

20 Q. Good afternoon, Mr. Herrick. I'd like to ask you a few
21 questions about yourself. What's your current occupation?

22 A. I'm retired.

23 Q. Congratulations. When did you retire?

24 A. May two years ago, so it will be two years in May.

25 Q. And, just to start a little bit further closer to the

1 beginning, could you briefly describe your educational
2 background starting with college?

3 A. So I have a bachelors degree in business management and
4 finance with one year's focus on engineering as well. I am a
5 master black belt in Lean Six Sigma. I'm a certified
6 professional in health care quality and I'm a phlebotomist and
7 I'm, I guess, also trained and certified in simulation-based
8 training.

9 Q. Okay. Let me ask you about this Lean Six Sigma black
10 belt. What does that actually entail?

11 A. So Lean Six Sigma is a focused operational management
12 practice. It was originally developed by Toyota, and most
13 people know it as a Toyota system, and it looks at statistical
14 analysis looking at variation in process flows and looking at
15 ways of optimizing process flows, and there's a large set of
16 tools that go with that, including Pareto charts and Five Why
17 charts and fishbones, et cetera, and it's a formal process to
18 analyze operational flow and look for optimization.

19 Q. And have you specialized in that area or used those tools
20 in the health care setting?

21 A. Yes.

22 Q. Okay. How long have you been -- well, just briefly about
23 your career, how long have you been on the operational side of
24 things in your private sector career?

25 A. Since the late 70s, 1970s.

1 Q. Okay. So largely most of your career?

2 A. Most of my career, yes.

3 Q. Okay. And, in terms of your operational experience, have
4 you also been employed in health care settings?

5 A. Yes.

6 Q. Okay. Can you briefly describe them?

7 A. So I served as the senior vice president of operations for
8 Columbia Presbyterian Medical Center in New York City.

9 Q. Columbia Presbyterian?

10 A. Yes.

11 Q. I served as the vice president for perioperative surgical
12 services at Dartmouth, as well as the regional vice president
13 for perioperative and interventional services for the Dartmouth
14 Health system.

15 Q. Say that one again, because I -- you're the vice
16 president, just for Dartmouth Health?

17 A. So I was the vice president for perioperative and surgical
18 services for five years at the Dartmouth-Hitchcock facility in
19 Lebanon, and for two years after that I was the regional vice
20 president or system vice president for all perioperative and
21 interventional systems within the Dartmouth Health system.

22 Q. Okay.

23 A. I also did some operational work with Barnes-Jewish in St.
24 Louis. There were 13 hospitals that were merging into one
25 health system, and I spent two years out there working with

1 them, helping them standardize and consolidate. So, instead of
2 having 13 departments sterilizing surgical instruments, we
3 consolidated into one consolidated laundry, consolidated OR
4 scheduling, things like that, and used the Lean Six Sigma tools
5 and the Lean focus to do that.

6 Q. How long did it take you to do all this training for this
7 Lean Six Sigma?

8 A. To be a Lean Six Sigma black belt, it was two years. To
9 become a Lean Six Sigma master black belt requires being a Lean
10 Six Sigma black belt and then teaching, developing curriculum
11 and teaching Lean processes and doing multiple projects, being
12 published and lecturing in that field and then being evaluated
13 based on your body of work. We did 24, I personally led 24
14 process improvement processes using Lean at Dartmouth system
15 through the Dartmouth Health system.

16 Q. Okay. So what level are you at now?

17 A. I'm at the highest level, master black belt.

18 Q. That's a master black belt?

19 A. Yes.

20 Q. I got to be honest, every time I say that out loud, I
21 think of Karate Kid. This is just all about processes and how
22 to have better operational flow?

23 A. It's, it's focused on quality, safety, access, throughput,
24 and flow. So to optimize the assets that we have and to
25 eliminate roadblocks or blockages that delay or inhibit the

1 process flows.

2 Q. Okay. And did you employ -- when did you become a master
3 black belt in Lean Six Sigma?

4 A. In, I believe, 2016 or '17.

5 Q. Okay. During the time that you were at --

6 A. It would have been, it would have been 2015. It was while
7 I was employed at Dartmouth, yes.

8 Q. Okay. So in Dartmouth Health let's just focus on that
9 now. How, when did you start there?

10 A. I start in 2011 at Dartmouth.

11 Q. So 2011 Dartmouth Health as the VP of perioperative
12 services?

13 A. No, no. I started as the manager of process improvement
14 within the periop space focused on identifying opportunities to
15 improve flows and within the periop place and, within the
16 periop space and within related areas, cath lab, EP lab,
17 endosuites, CT imaging, MRI imaging, that kind of thing.

18 Q. Okay. And what, if any, promotions did you receive at
19 Dartmouth Health?

20 A. So after one year I was promoted to the position of
21 manager of quality safety and process improvement for the
22 perioperative services within Dartmouth.

23 Q. Okay. Did you receive any promotions after that?

24 A. So I became the director of the Value Institute. The
25 facility created the Value Institute as an opportunity to

1 expand the utilization of standard work, standard process
2 improvement work, Lean processes. We developed a green belt
3 and a yellow belt curriculum, and we delivered it, and we
4 coached students through their process using a project to
5 become certified in process improvement. I eventually became
6 the director of that Value Institute process?

7 Q. When was that?

8 A. That would have been in 2014.

9 Q. Okay. So you became -- was that a -- this Value
10 Institute, there's been testimony in this case about the Value
11 Institute. Were you the first director of it?

12 A. I was second director.

13 Q. Second director? Okay. And, during the time that you
14 were director of the Value Institute, is that when you were
15 doing some of these tutorials and programs and other
16 examinations for people to learn the processes of Lean Six
17 Sigma?

18 A. Yes, sir.

19 Q. Okay. And you were doing that internally at Dartmouth
20 Health, correct?

21 A. Yes.

22 Q. And was that for a wide variety of employees?

23 A. Yes. Any employee could be nominated if they had an
24 interest in participating, so it was not focused just on
25 periop. It was on the entire system or the entire

1 organization.

2 Q. Okay. What, if any, further promotions did you receive
3 after being the director of Value Institute?

4 A. So around the third quarter October of 2015, I was invited
5 to assume the role of vice president of perioperative and
6 interventional services, surgical services.

7 Q. So vice president of perioperative and surgical services?

8 A. Yes.

9 Q. And that was in late 2015?

10 A. Yes.

11 Q. And what were your duties as the VP of perioperative and
12 surgical services?

13 A. So principally --

14 Q. Just briefly.

15 A. Okay.

16 Q. I'll get more specific once you give me a brief
17 description.

18 A. So I had, I'm going to say I had two main categories of
19 business. I had a direct piece of business that I managed and
20 a chain of command which managed all of the operating rooms,
21 including the ancillary services that supported that that would
22 be the pre-op area, the surgical suites, the post-op area, also
23 the standardization or sterilization of surgical instruments,
24 the building out of case carts, and centralized OR scheduling
25 for all of the procedures.

1 We had 37, a total of 28 operating rooms in the main OR, 6
2 operating rooms in the outpatient surgery center, and 3 hybrid
3 operations that included inline imaging. So we had MRI and CT
4 imaging in the operating room that could be used during the
5 service, surgery. And so that was my direct line of authority.
6 I had about 800 staff there, and that included all operations
7 from the time a patient arrived for surgery until they were
8 discharged out of the hospital from surgery or admitted into a
9 patient bed.

10 So that was, that was my direct line of authority.

11 Q. And, with respect to your direct line of authority, I just
12 want to make sure it's clear. First, just break this down for
13 me. What does perioperative stand for?

14 A. It's, it's inter-op. It's the pre-op, the inter-op, and
15 the post-op. So it's when a patient arrives and they're going
16 to be evaluated and set up for surgery, and then it's actually
17 the surgery and then it's the care after surgery to wake them
18 up from anesthesia and make sure they're ready to either be
19 discharged home or to be admitted to an inpatient bed.

20 Q. Would it be fair to characterize the three phases as
21 pre-op, peri-op, and post-op?

22 A. You could say that, or pre-op, intra-op, and post-op, but
23 it's peri-op is that, that's the term, yeah.

24 Q. Right. And peri-op is when they're in surgery and the
25 surgery is actually happening?

1 A. Yes.

2 Q. Okay. And, with respect to your duties as the VP of
3 perioperative and surgical services, you oversaw 25 ORs or 28?

4 A. I think 28 in the main OR and then 6 in the outpatient
5 surgery center and then 3 of the hybrid procedures surgical
6 suites.

7 Q. Surgery suites?

8 A. Yeah.

9 Q. Okay. Just make sure you enunciate. When you say the
10 surgery center, is that those ambulatory surgery centers that
11 you see from time to time?

12 A. Yes. We have one located on the grounds across the
13 parking lot, and we were running six operating rooms at the
14 time.

15 Q. Okay. And that was in addition to the 25 or 28 ORs that
16 you had going on? And this, you started in this VP role in the
17 fall of 2015?

18 A. Yes.

19 Q. And, at that time across the DH system, how high up the
20 food chain were you?

21 A. Pretty high up. I was --

22 Q. Who did you report to?

23 A. I reported to Dr. Merrens.

24 Q. Okay. So you weren't a manager at that point, right? You
25 were --

1 A. No. I was a vice president. I was a senior leader.

2 Q. And you reported directly to Dr. Ed Merrens?

3 A. That's correct.

4 Q. And he was the chief clinical officer?

5 A. Yes.

6 Q. Okay. And you said you had 800 or so people that reported
7 directly or indirectly to you?

8 A. Through my chain of command, yes.

9 Q. Okay. And then did you have somebody that reported -- and
10 strike that.

11 Vice president of perioperative and surgical services, was
12 that, at the time in late 15, so before you became regional VP
13 of the systemwide, was that attached to a certain department,
14 like the OB/GYN department, or was there --

15 A. No. It was for all surgeries.

16 Q. All surgeries?

17 A. All surgeries.

18 Q. Across the system?

19 A. Yes.

20 Q. Okay. As a result of -- and who reported directly to you?

21 A. So in that role I had a director of perioperative
22 services. I had a director of OR scheduling, director or
23 manager that ran surgical sterilization, CSR, the supply chain
24 folks. I also had, through that chain of command, all of the
25 nursing staff, the surgical technologists, the anesthesia nurse

1 anesthetists. So they all reported up through that.

2 Q. And, with respect to the specific OB/GYN department, did
3 you have a reporting relationship further down the line from
4 you?

5 A. So yes. So everything we've discussed so far has been
6 that first part of business which is where I had direct span of
7 control from an operational standpoint, and I was responsible
8 for all of the operational duties within that span of business.
9 I had a second span of business, and I operated as a partner
10 with the chair of each of the surgical sections in a
11 partnership mode.

12 So, for instance, the chair of orthopedics and I worked
13 together. I had a director that reported directly to me but
14 was physically located with the chair, and they were
15 responsible for managing the day-to-day operations within that,
16 that service. So I had one in the department of surgery, one
17 in OB/GYN, one in orthopedics, one in spine and pain, and one
18 in anesthesia. So I had five additional directors that
19 reported up to directly to me. They were on my budget. I did
20 their performance reviews, but they were collocated with each
21 of the chairs, and they worked daily with those chairs as, in a
22 collaborative manner. It was a way for the chair and myself to
23 represent the operational side and the clinical side.

24 Q. So with respect to, and I want to just focus on the OB/GYN
25 department.

1 A. Yes.

2 Q. So there's the chair of the OB/GYN department, right?

3 A. Yes.

4 Q. And in 2015 do you know who the interim chair of the
5 OB/GYN department was?

6 A. I believe it was Leslie DeMars.

7 Q. Okay. So and would she be in charge of the clinical side
8 of things?

9 A. Yes.

10 Q. Okay. And then did you have a director embedded in the
11 OB/GYN department?

12 A. Yes, I did, who reported directly to me.

13 Q. So you had a direct report?

14 A. Yes.

15 Q. Who was that?

16 A. Heather Gunnell.

17 Q. And Heather Gunnell, what was her title?

18 A. She was the director of OB/GYN.

19 Q. Okay. But she was coming up through the reporting
20 relationship to you in terms of perioperative services?

21 A. From an operational standpoint, yes.

22 Q. Okay. And so you had these directors embedded in each of
23 the other departments?

24 A. Yes.

25 Q. Okay. And, in terms of the operational side of things for

1 the OB/GYN department, what subjects are included within the
2 operational side of things for OB/GYN?

3 A. So it would be clinic operations. In particular, one of
4 the reasons that we organized the function this way was that
5 each function that has surgical procedures had in place and had
6 in place surgical schedulers, and they were scheduling for
7 their specific surgeons to get access and utilization of the
8 block allocation in the OR suite. And the challenge was that
9 each of those functions, department of surgery, department of
10 surgery had 13 services. Orthopedics had a service. Spine and
11 pain had a service, GYN had a service, and each of those
12 surgical services, the schedulers were utilizing different
13 technologies and processes in order to schedule into the
14 operating room.

15 One of the things that we did was standardize all of those
16 schedulers and have them remain physically there, but we
17 standardized how they did the work to be sure that they all
18 used the same system, that they put all of the schedules up the
19 same way so that we would have visibility into all of the
20 pending surgical schedules and all of pending surgeries that
21 were back-ordered and logged ready to go, and so that's how,
22 that was why we structured it that way.

23 Q. When you say we, was that one of your charges, so to
24 speak, when you became the VP of perioperative services to
25 coordinate this very complex web of surgical services across

1 the entire spectrum?

2 A. Yes. That was, that was the charge to standardize, and
3 that was one of the process improvement type of initiatives
4 that we undertook, and that was to standardize all of the
5 scheduling so that we would have a better way as an
6 organization to have visibility into how to efficiently utilize
7 the blocks, and it yielded significant improvement in our block
8 utilization.

9 Q. When you say you block utilization, do you mean when
10 surgeries were being performed so that they were done in an
11 efficient manner and used effectively so that other people can
12 get into the next block?

13 A. Yes.

14 Q. Okay.

15 A. That's a good way of saying it.

16 Q. Thank you. With respect to -- just run through very
17 specifically your duties. So on a day-to-day basis, you had
18 oversight of all the operating rooms; is that correct?

19 A. Yes.

20 Q. Okay. And you had to ensure that the different
21 departments, specifically the ones that had surgical services,
22 were managing their budget and their budget allocations,
23 correct?

24 A. Yes.

25 Q. Were you responsible for making major decisions on the

1 nonclinical part of things?

2 A. Yes.

3 Q. Okay.

4 A. That's correct.

5 Q. And, in terms of OR scheduling, instrument sterilization,
6 case cart building, those were all things that were under your
7 purview?

8 A. Yes, under my direct purview.

9 Q. You were the VP of perioperative services in late '15, and
10 then how long did you stay in that role before going up to the
11 system RVP role?

12 A. About five years.

13 Q. Five years? So from October of 2015 to roughly October of
14 2020?

15 A. Yes.

16 Q. Okay. And then, from October of 2020, you were promoted
17 to a regional VP role across the entire system?

18 A. Yes, that's correct.

19 Q. The Dartmouth Health system, correct?

20 A. Yes, yes.

21 Q. And you remained in that role until your retirement --

22 A. Yes.

23 Q. -- in May of 2023?

24 A. Yes.

25 Q. Okay. I just want to ask you just a brief question

1 because we're kind of spanning a period of time that included
2 the pandemic. During the pandemic, do you recall
3 implementation of a wage freeze across the board by Dartmouth
4 Health?

5 A. Yes. Things were very tight, and no raises were given.
6 Yeah.

7 Q. So for historical purposes, first of all, the fiscal year
8 for Dartmouth Health, does that run on a June 30, July 1 --

9 A. Yes.

10 Q. -- timeframe? So in 2020, June 30, 2020 would have been
11 -- July 1, 2020 would have been the start of the next fiscal
12 year, correct?

13 A. That's correct.

14 Q. And that would be considered, quote, unquote, fiscal year
15 '21?

16 A. Yes.

17 Q. And so July 1, 2020 going all the way to June 30, 2021,
18 that would be fiscal year '21?

19 A. Yes.

20 Q. And then the following year after that would be fiscal
21 year '22?

22 A. That's correct.

23 Q. Were those the years during which a wage freeze was
24 implemented by Dartmouth Health?

25 A. That's true, yes.

1 Q. Okay. Now, with respect to the people that were in your
2 chain of command, just kind of jumping back to your duties
3 again, did you have any oversight over clinicians, or was that
4 left to the chairs of the different departments?

5 A. That was the chair's responsibility.

6 Q. Did you have an ability to judge their technical
7 competence from a clinical standpoint?

8 A. No, with an exception basis. If a problem arose that
9 would have report through if there was a quality service issue,
10 but, no, I did not judge their clinical skills.

11 Q. To the extent -- sorry to interrupt you. To the extent
12 that there were clinicians and their clinical duties, that was
13 outside your purview?

14 A. That's correct.

15 Q. Okay. And do you recall working with the OB/GYN
16 department and specifically the divisions under the OB/GYN
17 department when you were VP of perioperative surgical services?

18 A. Yes.

19 Q. Okay. And you said you recalled the chairperson Leslie
20 DeMars, the interim chair?

21 A. Yes.

22 Q. Okay. And what, if any, responsibilities did your direct
23 report, Heather Gunnell, have vis-a-vis the OB/GYN department
24 during that timeframe?

25 A. Well, Heather would have responsibility for coordinating

1 the services from an operational standpoint within the clinics,
2 including managing budgets and process flows.

3 Q. Okay. And were you -- and did that include also the REI
4 division underneath the OB/GYN department?

5 A. Under Heather, yes.

6 Q. And how often were you in contact with Heather Gunnell
7 with respect to her duties vis-a-vis the OB/GYN department and
8 specifically the REI division?

9 A. Well, we spoke weekly, and whenever issues arose, if she
10 needed help or required assistance, she would bring it to me.
11 We would review budgets quarterly.

12 Q. Okay. And I want to focus just on the REI division in
13 particular. Did you know any of the physicians that were in
14 the REI division?

15 A. By name only.

16 Q. Okay. Are you aware of the name Albert Hsu?

17 A. Yes.

18 Q. Okay. Did you have any knowledge at any point while you
19 were employed there of any complaints, concerns, reports, made
20 by anyone regarding the competency of Dr. Hsu?

21 A. No.

22 Q. Another physician that was in the REI division at that
23 time or shortly thereafter in 2016 was an individual by the
24 name of David Seifer. Do you have any knowledge, or did you
25 have any knowledge during the time that you were employed at DH

1 of any complaints, concerns, or reports regarding the
2 competency of Dr. Seifer?

3 A. No direct knowledge, no.

4 Q. Okay. Any knowledge whatsoever?

5 A. No.

6 Q. Okay. And, with respect to -- and this would apply to any
7 complaints about safe, patient safety, patient harm, anything
8 like that.

9 A. I'm not aware of any.

10 Q. Okay. Did you have any interactions with David Seifer as
11 a physician in the REI division?

12 A. No.

13 Q. You don't have any knowledge -- did you ever meet David
14 Seifer?

15 A. I may have. I don't recall.

16 Q. You don't have any specific recollection?

17 A. No.

18 Q. Okay. Do you know the plaintiff in this case, Dr. Misty
19 Blanchette Porter?

20 A. No. I mean, by name and maybe by appearance.

21 Q. Okay. When you were the VP of perioperative services
22 during this timeframe, 2015, 2016, and into 2017, did you ever
23 receive any knowledge, any information about any leaves of
24 absence that Dr. Porter had?

25 A. No.

1 Q. Okay. Did you become aware at some point that Dr. Porter
2 was on a leave of absence during that timeframe?

3 A. Yes.

4 Q. Okay. Were you aware of the reason for any of her leaves
5 of absence during that timeframe?

6 A. No.

7 Q. I'm going to ask you some questions about the REI division
8 specifically, as well as its closure. Do you recall the REI
9 division being closed in May of 2017?

10 A. Yes, I do.

11 Q. Okay. Were you part of a small cohort of people that was
12 involved in the closure of the REI division?

13 A. Yes, I was.

14 Q. Okay. And was that within the realm of your job duties as
15 VP of perioperative services?

16 A. Yes.

17 Q. And, at that point in May of 2017, you were still in that
18 role, correct?

19 A. Yes, that's correct.

20 Q. And, with respect to your reporting relationship, you
21 reported up directly to Ed Dr. Merrens, correct?

22 A. That's correct.

23 Q. And did you have regular communications with Dr. Merrens
24 in that capacity?

25 A. Yes.

1 Q. While you may have been aware of her leave of absence at
2 some point, do you know whether or not Dr. Porter was on a
3 leave of absence or reduced schedule in May of 2017?

4 A. I do not know.

5 Q. Okay. So, in light of that lack of knowledge, did you,
6 did Dr. Porter's status, whether she was on leave or minimally
7 on leave or reduced schedule or working part time, did any of
8 that impact your recommendations relating to the REI division
9 in that timeframe?

10 A. No, sir.

11 Q. With respect to the REI division closure, that was, would
12 you, how would you -- would you characterize that as a
13 significant event?

14 A. Yes.

15 Q. Okay. Do you recall when discussions began regarding a
16 potential closure of some or all of the REI division?

17 A. It would have been in January or February of 2017.

18 Q. At that point, were you aware of whether or not the REI
19 division was doing any programs or projects or reviews by the
20 Value Institute?

21 A. Yes.

22 Q. And how were you aware of that?

23 A. So Heather reported to me that there had been some issues
24 regarding service issues within the division and that she was
25 working with the Value Institute to have them come in and do

1 some assessments, and I told her I thought that was appropriate
2 and encouraged her to develop a project charter and be sure
3 that we use the Value Institute tools and go ahead and keep
4 that going and keep me apprised.

5 Q. Okay. So you understood that Ms. Gunnell was going to
6 spearhead that effort with the Value Institute?

7 A. Yes.

8 Q. And did you have full faith in her abilities?

9 A. Yes.

10 Q. During the time that you were her, she was your direct
11 report, did you give her favorable performance reviews?

12 A. Yes, I did.

13 Q. Okay. Did you have a solid working relationship with her?

14 A. Yes.

15 Q. Did you think highly of her abilities?

16 A. I still do.

17 Q. Okay. And, with respect to the Value Institute in the
18 January, February 2017 timeframe, you said that Ms. Gunnell had
19 identified issues regarding service issues. Did she, at least
20 in a general way, explain to you what the, what the issues were
21 that precipitated having to use the Value Institute?

22 A. Yes, that there was an inordinately high turnover rate
23 among nursing staff and that there had been some customer
24 complaints related to communication and service, service
25 satisfaction rates. She included the, the information that it

1 appeared there were three silos of the three physicians, that
2 they were each working their program differently, and that it
3 was a perfect example of where the Value Institute and the Lean
4 tools could be utilized to standardize the processes and that
5 she'd engage the Value Institute to help them do that.

6 Q. So sometime in that timeframe, say, December 2016 leading
7 into 2017, she made you aware of the fact that she encountered
8 silos within the REI division?

9 A. Yes.

10 Q. And that was with respect to the three physicians that
11 were there?

12 A. That's correct.

13 Q. Okay. Does this, was this a microcosm? Would it be fair
14 to call this a microcosm or a small example of what you were
15 charged with doing vis-a-vis the perioperative functions of all
16 the surgery groups?

17 A. Exactly, a great example.

18 Q. When you came back, when you were promoted into the VP of
19 perioperative services, was there a, were you met with the
20 challenge of trying to coordinate the 13 surgical clinics
21 across the board?

22 A. Yes.

23 Q. Okay. And, with respect to this specific issue of the REI
24 division in early 2017, was this an example reminiscent of
25 that?

1 A. It is, yes.

2 Q. Can you explain that for the jury, why?

3 A. Why it was reminiscent?

4 Q. Why it was reminiscent, and then I'll ask you a follow-up
5 question as to what was the plan to do about it?

6 A. Well, it, again, it illustrated the lack of coordination,
7 the lack of system, the lack of standard work, and which was
8 yielding issues related to staffing.

9 Q. And did you have an understanding that there was a
10 shortage of specific REI nurses in the REI division at that
11 time?

12 A. Yes.

13 Q. And did Ms. Gunnell go into detail with you as to what she
14 think precipitated that?

15 A. Well, as a result of the Value Institute work, she shared
16 with me some of the results, yes.

17 Q. And how did she describe the dynamic, the team dynamic to
18 you within the REI division at that point?

19 A. Dysfunctional and --

20 Q. In what way?

21 A. -- inefficient. Well, so as an example, because each
22 provider had their own staff, administrative staff, nursing
23 staff, if a patient called in to the REI division to have a
24 conversation about issues, clinical or scheduling issues and so
25 on and their particular team was not there, the call would go

1 to voicemail and would not be responded to until that team
2 returned.

3 In a normal clinic space with three providers, you would
4 expect that all calls would be answered and screened and not
5 left in voicemail. So that's one example, and that was one of
6 the complaints that had come up from some of the patients, that
7 they were unable to communicate efficiently with their team.

8 Q. And so with respect -- and would that be the effect, the
9 cause being the silo by the effect being that calls would go
10 unanswered?

11 A. Yes.

12 ATTORNEY SCHROEDER: Your Honor, I'd like to show Mr.
13 Herrick a document marked Defendant's Exhibit 6 just for the
14 Court and attorneys and Mr. Herrick for the time being.

15 THE COURT: Okay.

16 ATTORNEY SCHROEDER: May I approach him?

17 THE COURT: Yes.

18 BY ATTORNEY SCHROEDER: Thank you.

19 Q. Mr. Herrick, this is a rather long document. I'm not
20 going to ask you about all the powerpoint slides behind it, but
21 could you identify this document? Do you know what it is?

22 A. I'm reading it.

23 Q. Okay.

24 A. Give me a second.

25 Q. It's dated June 17, 2016 from Heather Gunnell to you,

1 Leslie DeMars, and Nancy Devenger.

2 A. Yes. So it looks to be a letter of transmittal
3 identifying a project charter that she had put together at my
4 request to look at the communications and work flow challenges
5 that were currently being realized within the division.

6 ATTORNEY SCHROEDER: Okay. Your Honor, may I move
7 for admission of Defendant's Exhibit S?

8 THE COURT: Any objection?

9 ATTORNEY VITT: No objection.

10 THE COURT: Okay. Defendant's Exhibit S is admitted

11 ATTORNEY SCHROEDER: May I have it published for the
12 jury?

13 THE COURT: Yes.

14 BY ATTORNEY SCHROEDER:

15 Q. And I'm just going to stick on the first page,
16 Mr. Herrick, and not go through the powerpoint, but this dates
17 back to June 17, 2016. So, at that point in time, were you,
18 does this refresh your recollection as to when you became aware
19 of certain challenges in the work flow and processes within the
20 REI division?

21 A. So ask that again. I'm sorry.

22 Q. Sure. I realize you were looking at the document. Does
23 this refresh your recollection as to the first time that you
24 were becoming aware of any challenges with the work flow,
25 teamwork, coordination of services, by members of the REI

1 division?

2 A. Yes.

3 Q. Okay. And did you charge Ms. Gunnell with coming up with
4 a proposed plan to tackle those challenges and frustrations?

5 A. Yes.

6 Q. Okay. And is this part of that effort to do so?

7 A. Yes.

8 Q. Thank you. You can take that down. Actually, you know
9 what? I'm sorry. Bring it back up. Few more questions. So,
10 if you just thumb through this document for me, which is a long
11 powerpoint of slides, and we can perhaps go to the seventh page
12 titled "OB/GYN REI Time Study Results". What were, what was
13 the purpose of this endeavor, do you know?

14 A. So each of these slides are standard tools that the Value
15 Institute developed in terms of how to identify opportunities
16 to separate the symptoms from the root cause, and this is a
17 typical request that we would make of the Value Institute to
18 come in and observe, do process mapping and time analysis.

19 Q. Okay. And so these efforts were being undertaken during
20 this timeframe to put in place better processes for ensuring
21 that your patients' service satisfaction scores would go up, in
22 part?

23 A. Yeah. So the Lean process basically looks at defining the
24 current state and understanding what the current state is
25 mapping it all out and doing the time study. So this would

1 have been under the defined step, and then the next step would
2 be to analyze that data, and then we do identify opportunities
3 to improve them and then to implement them.

4 Q. Okay. You can take that down now. What did you determine
5 at the outset of this process in terms of where the REI
6 division was in terms of how it dealt with work flow issues and
7 patient calls and navigating a patient from the start to the
8 end?

9 A. So we understood that there was challenges, that it was
10 not being run efficiently, and that there were likely
11 significant opportunities to improve the flow, the efficiency,
12 and the customer service.

13 Q. And, during the late summer, fall, and winter of '16, did
14 Ms. Gunnell, to your knowledge, engage the Value Institute in
15 attempting to address those challenges and frustrations?

16 A. Yes, she did.

17 Q. Okay. And do you recall whether or not they were
18 successful as a result of -- whether or not REI division and
19 Ms. Gunnell's coordination of this project successful at
20 achieving better work flows and processes?

21 A. They were unsuccessful.

22 Q. They were unsuccessful? And when did you learn that?

23 A. In mid-March to April, somewhere in that timeframe, we had
24 a report out from the Value Institute team that had been doing
25 the work, and I was invited to that meeting along with

1 Dr. DeMars and Heather.

2 Q. And so, just so that the jury understands, so in March or
3 April of 2017, there was a meeting between yourself, Heather
4 Gunnell, Leslie DeMars, and members of the Value Institute?

5 A. Members of the Value Institute as well as a vice president
6 from HR.

7 Q. And VP of HR?

8 A. Yeah.

9 Q. And what was the conclusion of the report out from the DH
10 Value Institute?

11 A. So the DH Value Institute team, I learned from them that
12 they had identified a number of opportunities to improve the
13 flow and the structure within the organization, but they were
14 unable to get the team to agree to make those changes, that it
15 was, in their mind, an unsustainable function because the team
16 was not willing to make those enhancements to the process flow
17 and that it would not be sustainable.

18 Q. And was that related to all members of the team?

19 A. Yes.

20 Q. So, not just the nurses and the staff, but also the
21 physicians within the REI division?

22 A. That's, yes. And, and I learned at that meeting also from
23 the vice president of HR that they were going to stop
24 recruiting nurses for the REI division because the nurses that
25 they were recruiting and hiring in, the turnover was so short

1 and at such a high rate that, with a housewide shortage of
2 nurses, they were going to attend all of their time recruiting
3 nurses for other parts of the business. We just had too many
4 shortages, and they just were not going to do it any longer.

5 Q. And this was in the March, April 2017 timeframe?

6 A. Yes.

7 Q. And, up until that point, though, to your knowledge, was
8 the organization, specifically HR, working to staff the REI
9 division?

10 A. Yes.

11 Q. With REI nurses?

12 A. Yes.

13 Q. And there were challenges in that regard, correct?

14 A. That's correct.

15 Q. And Ms. Gunnell attributed that in part to challenges of
16 the dynamic of people working in the REI division?

17 A. That is, that's correct.

18 Q. Now, after learning that the efforts with the Value
19 Institute and trying to address concerns and frustration about
20 how, the work flow of the REI division in that March, April
21 timeframe, what, if anything, did you do to address that issue?

22 A. Immediately following that meeting, I asked Dr. DeMars to
23 remain behind with me after everyone else left, and I shared
24 Dr. DeMars my strong opinion that this system was unsustainable
25 and that the best option would be for us to shut down this

1 division. Dr. DeMars was saddened. I will say she cried. But
2 she did agree with me that, given everything that we had just
3 heard, that it did make sense for us to shut the division down.
4 It was just no longer workable.

5 ATTORNEY SCHROEDER: Okay. Your Honor, I'd like to
6 show the Witness a document that's been marked Plaintiff's
7 Exhibit 40A and also give the Court a copy of it. It is a, now
8 a complete version of that document and ask to show it to the
9 Witness as well.

10 THE COURT: Okay.

11 ATTORNEY SCHROEDER: Plaintiff's counsel has seen
12 this as well.

13 BY ATTORNEY SCHROEDER:

14 Q. Showing you a document that's been marked Plaintiff's
15 Exhibit 40A, Mr. Herrick, do you recognize this document?

16 A. Yes, I do.

17 Q. It's a two-page document, correct?

18 A. That's correct.

19 Q. And it's dated April 18, 2017 from you to Leslie DeMars?

20 A. Yes.

21 ATTORNEY SCHROEDER: Okay. Ask for admission, Your
22 Honor, of Plaintiff's Exhibit 40A.

23 THE COURT: Any objection?

24 ATTORNEY VITT: No objection.

25 THE COURT: Okay. 40A is admitted.

1 ATTORNEY SCHROEDER: May I have it published for the
2 jury, please?

3 THE COURT: Yes.

4 BY ATTORNEY SCHROEDER:

5 Q. Now, this is April 18, 2017, correct?

6 A. That's correct.

7 Q. And you're writing this email to Leslie DeMars, right?

8 A. Yes.

9 Q. And who is Sam Shields?

10 A. Sam Shields was the director of the Value Institute at the
11 time.

12 Q. The director of the Value Institute? Okay.

13 A. Yes.

14 Q. And here on the first page you say, "Attached is a summary
15 worksheet that we put together. I spoke with Sam today and
16 he's agreed to provide us with a project manager to support our
17 strategy to shut down IVF and put the REI program on hold. I
18 think we are ready to share our plans with Ed and Maria. I
19 will let you take the lead on that".

20 Ed is Ed Merrens?

21 A. Yes, that's correct.

22 Q. And Maria is Maria Padin?

23 A. Yes, that's correct.

24 Q. Now, at this point, it says, "Shut down IVF and put the
25 REI program on hold". Was that your recommendation or someone

1 else's?

2 A. That was my recommendation to shut the system down.

3 Q. Okay. Well, it says here, "Shut down IVF and put REI
4 program on hold".

5 A. Put it on hold until we decided whether or not we were
6 shutting everything down, yes.

7 Q. Did, during this process, did Dr. DeMars express any
8 reservations about putting the whole REI program?

9 A. Dr. DeMars would like to have kept the REI in place and to
10 shut down only the IVF program.

11 Q. And that was her sentiment?

12 A. Yes.

13 Q. But what was your sentiment?

14 A. My sentiment was to shut the entire system down.

15 Q. Okay. Before any, before your consideration of whether or
16 not it was an IVF shutdown or a complete REI shutdown including
17 IVF, do you recall whether or not the budget and revenue
18 projections for the REI division overall?

19 A. Marginally profitable for the combined IVF/REI.

20 Q. If you go on the second page, there are a couple of things
21 here, and I just want to identify what this document is. And,
22 in the right-hand corner at the bottom, it says DPH. Is that
23 you?

24 A. Yes.

25 Q. Okay. And did you attach your initials to documents that

1 you assisted in drafting?

2 A. That's correct.

3 Q. Okay. Now, there's notes in here from Heather Gunnell,
4 and what was the purpose of those notes?

5 A. So I had -- so this is my document. I created this
6 document. I collected data. I formatted it, and I shared it
7 with Heather. She identified the addition of the percentages
8 just to add, I guess, a depth to the document.

9 Q. Okay. So this was just looking at the profit and loss
10 statement for the overall division?

11 A. Yeah. And so I'll point out that the IVF was profitable
12 to the tune of approximately a million dollars, that the REI
13 division was unprofitable to the tune of roughly \$800,000. So,
14 therefore, we were, you know, in the neighborhood of 177,
15 \$178,000 total marginal profitability. To shut down the IVF
16 division and maintain the REI division would have then led us
17 at an \$800,000 loss. I did not recommend that. I recommended
18 shutting everything down.

19 Q. And who's Tamara Heath here?

20 A. Tamara Heath was a financial analyst at the time.

21 Q. So the purpose this document was just to show what?

22 A. To show financially where we were and to marry that with
23 the information we learned from the report out from the Value
24 Institute about the dysfunction within the department.

25 Q. Okay. And, in terms of -- you can take that down. In

1 terms of your recommendation even at this point -- set aside
2 economics. Your recommendation was what?

3 A. Shut it all down.

4 Q. So, not just the IVF, but the REI, the entire REI
5 division?

6 A. Yes.

7 Q. Okay. And that came, that came out of the results of the
8 Value Institute?

9 A. Yes.

10 Q. Okay. And, at that point, was Dr. DeMars, quote, unquote,
11 on board with your recommendation, or did she have a different
12 recommendation?

13 A. Dr. DeMars vacillated. When she and I had the initial
14 conversation immediately following the Value Institute
15 presentation, she was 100 percent on board with shutting it all
16 down, and then over time she began to waver and express desire
17 to at least hope that, at some point in the future, we may be
18 able to reinstitute the program and, therefore, would like to
19 keep the REI division up and running so that we would have a
20 foundation in order to rebuild IVF.

21 Q. But that was not your recommendation, correct?

22 A. No, it was not.

23 Q. What about Heather Gunnell, did she make any
24 recommendations regarding the REI division?

25 A. I believe that Heather Gunnell was on the same page as I

1 was.

2 Q. Okay. Now, did you, at some point, communicate your
3 recommendations, as well as the recommendations of Heather
4 Gunnell, to Dr. Ed Merrens?

5 A. Yes, I did.

6 Q. Okay. And, in terms of the ultimate decision maker on
7 whether or not REI division would continue, who made the, who
8 made the decision to close the REI division?

9 A. Ultimately, it would have been Dr. Merrens.

10 Q. Okay. And do you recall how soon after you communicated
11 your recommendation that Dr. Merrens made that decision?

12 A. Relatively short.

13 ATTORNEY SCHROEDER: Okay. Your Honor, if I may give
14 the Court, as well as the Witness, Plaintiff's Exhibit 50A, it
15 is a complete version of plaintiff's Exhibit 50.

16 THE COURT: Yes.

17 ATTORNEY SCHROEDER: Already given that to the
18 opposing counsel. Thank you.

19 BY ATTORNEY SCHROEDER:

20 Q. Mr. Herrick, I am showing you a document marked
21 Plaintiff's Exhibit 50A. It's dated April 21, 2017 from you to
22 Ms. Gunnell. Do you recognize this document?

23 A. Yes, I do.

24 Q. And what is it, just generally speaking?

25 A. So it is a summary of the assumptions that we would use

1 that were used in the evaluation of whether or not to shut down
2 the division.

3 Q. Okay.

4 A. And the assumptions meaning the points of information that
5 we identified to validate the analysis.

6 Q. And did that include the financial projections that we
7 just went over in the previous exhibit?

8 A. Yes, it did.

9 ATTORNEY SCHROEDER: Your Honor, I'd move for the
10 admission of Plaintiff's Exhibit 50A.

11 THE COURT: Any objection?

12 ATTORNEY VITT: No objection, Judge.

13 THE COURT: Okay. 50A is admitted.

14 ATTORNEY SCHROEDER: And may I publish that for the
15 jury?

16 THE COURT: Yes.

17 BY ATTORNEY SCHROEDER:

18 Q. Now, the subject line for this or the attachment says "REI
19 Program Strategy", right?

20 A. Yes.

21 Q. I want to go to the second page for a second. Did you
22 share this document? This document was shared between you and
23 Ms. Gunnell, and it's got some assumptions here. What was the
24 basis for the assumptions?

25 A. Well, as you look at the assumptions, it summarizes the

1 information that we learned from the report out at the Value
2 Institute about staffing turnovers, about the operations being
3 dysfunctional, that the ability to fix them had failed, the
4 efforts had failed, that we assume that the demand continues to
5 exist, and that we're going to stop the program immediately.

6 Q. Okay. So the first, the first bullet point says, "Current
7 staffing issues have rendered the REI program unsustainable,
8 resulting in unacceptable levels of care for our patient
9 population as well as marginal financial viability", right?

10 A. Yes.

11 Q. The next one says, "Internal department operations
12 acknowledged to be totally dysfunctional with significant
13 process and patient care variations between providers and
14 staff", right?

15 A. Correct.

16 Q. And that, that problem stemmed back from the summer of
17 2016, correct?

18 A. That work, yes.

19 Q. Specific, the next one, "Specific attempts to rectify
20 operations dysfunction have failed", right?

21 A. Yes.

22 Q. "Despite current marginal", the next one, "Despite current
23 marginal financial performance, it's assumed that the patient
24 demand exists to support this program when operated in a
25 proficient manner", right?

1 A. Correct.

2 Q. Then it says, "Decision has been taken to immediately stop
3 this program, accepting no new patients and referring all
4 existing patients to other program", right?

5 A. That's correct.

6 Q. And had that already been underway in a smaller version or
7 variation of stopping new patient intake and referring or at
8 least putting a pause on services for IVF?

9 A. Yes. We had stopped new patients, and we were completing
10 the cycle of patients that were in.

11 Q. Okay. Now I want to ask you about this last bullet point
12 which says, "Decision has also been taken to develop a business
13 and operating plan to restart the REI program at a later date
14 based on review and approval of the new business plan.
15 Embedded in this decision is a plan to maintain our current lab
16 operations in conjunction with UVM".

17 Now, at that point, was there any business plan or
18 operating plan to continue to have REI division in place?

19 A. There was not.

20 Q. There was not? Was that one of the things that Dr. DeMars
21 was advocating for at that time?

22 A. Yes.

23 Q. Okay. This document was just shared with Heather Gunnell,
24 right?

25 A. That's correct.

1 Q. You didn't share this document with Dr. Merrens or
2 Dr. Padin?

3 A. I did not.

4 Q. Okay. And why didn't you do that?

5 A. There really was no plan to reinvigorate the IVF program
6 at that point, but we did not want to put a roadblock, but we
7 had no plans. There had been no plans, and I had no plans.

8 Q. Okay. And then, after having this discussion with Ms. or
9 sending this to Ms. Gunnell, did Dr. Merrens communicate his
10 decision on what should happen with the REI division?

11 A. Yes.

12 Q. And what was that?

13 A. To shut it down completely.

14 Q. Okay. And that was consistent with the recommendations
15 that you and Ms. Gunnell had given, correct?

16 A. That's correct.

17 Q. But also partially in compliance or partially in support
18 of the recommendations of Dr. DeMars, at least with respect to
19 the IVF program?

20 A. That's correct.

21 Q. Okay. At this point, was Dr. DeMars still trying to
22 figure out a way to, or was she attempting to figure out a way
23 to have some kind of pause on the REI division overall?

24 A. She wanted to continue to keep the REI and to keep the
25 door open to reinvigorating the IVF program.

1 Q. And but that, that idea was rejected by Dr. Merrens,
2 correct?

3 A. Yeah, yes, and by me as well.

4 Q. And did you share the specific bases as to why you were
5 recommending that the REI division should be shut down
6 altogether to Dr. Merrens?

7 A. Yes.

8 Q. Then after that Dr. Merrens made a decision to shut down
9 the REI division altogether?

10 A. That's correct.

11 ATTORNEY SCHROEDER: Your Honor, if we can show the
12 Witness Plaintiff's Exhibit 84, I believe it's been admitted
13 into evidence earlier today.

14 COURTROOM DEPUTY: B4?

15 ATTORNEY SCHROEDER: 84, is that correct?

16 COURTROOM DEPUTY: Yes.

17 BY ATTORNEY SCHROEDER:

18 Q. Okay, thank you. Just a few quick questions, Mr. Herrick.
19 First of all, I want to ask you about your relationship or
20 working relationship with Leslie DeMars. Did you, in the
21 process of the REI division being closed down, did you have
22 interaction with Leslie DeMars?

23 A. Yes.

24 Q. What were your thoughts on her leadership skills, if any?

25 A. I did not think that Leslie was a very strong leader.

1 Q. Why?

2 A. She was hard to -- it was hard for her to make a decision
3 and stick with it. She was, I guess, wishy-washy is the way to
4 say it, and she was influenced by whomever she spoke with, and
5 she also, as a leader, was, found it extremely difficult to
6 make the hard choices, the hard decisions that needed to be
7 made.

8 Q. And did you understand that to be, the REI division
9 closure to be an example of those weaknesses?

10 A. Yes.

11 Q. Okay. Did you communicate that to Dr. Merrens?

12 A. Yes.

13 Q. Did you have any knowledge of the relationship, at least
14 tangentially, knowledge of the relationship between Leslie
15 DeMars and Dr. Porter?

16 A. To the extent that Dr. DeMars shared with me, yes.

17 Q. Okay. And in this email it's just an email from you to
18 Dr. Merrens, and it's dated May 12th, correct?

19 A. Correct.

20 Q. And this is after, it's eight days after the REI division
21 closure is announced to the, within the organization, correct?

22 A. Correct.

23 Q. And it's eight days after those three physicians in the
24 REI division were notified of their termination, correct?

25 A. I believe that's true, yes.

1 Q. Okay. And here you say, "Ed, I'm not including Leslie in
2 this response. Based on my observations and interactions,
3 Misty has been the biggest driver to the dysfunction within
4 REI. The personal relationship that Leslie has with Misty
5 contributed significantly to this not being addressed in an
6 appropriate and timely manner. There is no question regarding
7 competence; however, I have also received unsolicited input
8 from a surgeon who has been here for a long time thinking out
9 loud that it's about time. It will be interesting to see how
10 Leslie responds".

11 Your knowledge of the relationship between Dr. DeMars and
12 Dr. Porter was based on your communications with Dr. DeMars,
13 correct?

14 A. Exclusively, yes.

15 Q. And, with respect to the issue of the driver of
16 dysfunction within REI, did that in any way relate to the
17 findings of the Value Institute that you received prior to the
18 date of this email?

19 ATTORNEY VITT: Your Honor, leading.

20 THE COURT: Sustained.

21 BY ATTORNEY SCHROEDER:

22 Q. With respect to the conclusions regarding, or I should say
23 the statement, "Misty has been the biggest driver to the
24 dysfunction within REI", what did, what was the basis, factual
25 basis for that statement?

1 A. The basis would have been what I was told by Dr. DeMars.

2 Q. Okay. And did, this followed -- did this, did that
3 conversation follow the report from the Value Institute which
4 had been sometime in March, April?

5 A. Actually, I think it's accumulation of conversations both
6 before and after.

7 Q. So both before and after the Value Institute's findings?

8 A. Yes.

9 ATTORNEY SCHROEDER: Nothing further at this time,
10 Your Honor.

11 THE COURT: Okay. Cross-examination?

12 CROSS-EXAMINATION BY ATTORNEY VITT

13 Q. Good afternoon, Mr. Herrick.

14 A. Good afternoon.

15 Q. You talked about the scheduling of surgery. Is it
16 accurate to say that the IVF procedures are not performed in
17 the operating room?

18 A. That's correct. That only was referring to surgeries that
19 are performed in the operating suites.

20 Q. Okay. I took a look at the information about the loss,
21 and in round numbers the REI division without having IVF would
22 have a loss of about \$800,000 a year?

23 A. Yeah, that's correct.

24 Q. Okay. At this time, how many women and girls received
25 reproductive health care every year from Dartmouth-Hitchcock?

1 A. I'm not aware of what that answer is.

2 Q. Thousands, perhaps? Hundreds?

3 A. I doubt it's thousands.

4 Q. Hundreds?

5 A. I don't know.

6 Q. Well, certainly you understand, I think, that women and
7 girls went to Dartmouth-Hitchcock to get reproductive health
8 care other than IVF, right?

9 A. Yes.

10 Q. Okay. Do you have any idea of the scope of the health
11 care that was provided to them?

12 A. I guess I don't understand the question.

13 Q. Well --

14 A. The types of work that GYN services provide?

15 Q. Yes. If women and girls are going to Dartmouth-Hitchcock
16 for reproductive health care, do you have some sense of the
17 scope of the reproductive health care that they receive?

18 A. I'm not a clinician, so no.

19 Q. You don't know? Okay. The process that you've described
20 of kind of evaluating the situation in REI and coming to a
21 recommendation, that lasted for, what, several months, perhaps?

22 A. Yes.

23 Q. Okay. At any point before the decision was made and
24 announced to close the REI division, did you or anyone working
25 for you contact the OB/GYN department and ask, What is Misty

1 Porter's current workload doing regular OB/GYN work?

2 A. I'm not aware of that conversation.

3 Q. Could we agree that trying to find that out might take a
4 few hours at max? I mean, it wouldn't take very long to come
5 up with that information, would it?

6 ATTORNEY SCHROEDER: Objection, calls for
7 speculation.

8 THE COURT: Overruled.

9 THE WITNESS: I can't imagine it would take an
10 extended period of time.

11 BY ATTORNEY VITT:

12 Q. Do you recall that -- I think you came to my office. I
13 forget where it was -- we had a deposition together? I took
14 your deposition, right?

15 A. Yes, yes, you did.

16 Q. Okay. And I believe that you said, We didn't fire
17 doctors. We let them go because we didn't have a need for
18 their work. Do you recall that?

19 ATTORNEY SCHROEDER: Objection, Your Honor.

20 ATTORNEY VITT: Let me --

21 THE COURT: Basis?

22 ATTORNEY SCHROEDER: It's inappropriate.

23 ATTORNEY VITT: I'm going to hand you what's been
24 marked as 97.

25 THE COURT: No. Did you ask to approach the bench?

1 I think there's an objection.

2 ATTORNEY SCHROEDER: There is an objection.

3 ATTORNEY VITT: You want to approach?

4 (Bench conference begins.)

5 ATTORNEY SCHROEDER: Objection to the question in
6 trying to summarize whatever his testimony was in his
7 deposition. If he wants to attempt to impeach him with his
8 deposition transcript, he can do that. And I assumed he was
9 going to do that because he had actually identified them
10 already during a break before we came back. So that's what I
11 assumed was going to happen, but I object to this manner and
12 procedure in which he was trying to ask the question.

13 THE COURT: Might be premature. He didn't ask a
14 question yet.

15 ATTORNEY SCHROEDER: Well, he was asking a question
16 specifically about his testimony, and he was actually trying to
17 quote the testimony from the deposition.

18 THE COURT: Right, like what happened this morning on
19 direct for witnesses that Ms. McDonald examined.

20 ATTORNEY SCHROEDER: Except for that was to correct
21 the fact that that answer yesterday that Dr. Merrens gave was
22 only a partial part of that answer. It was not his complete
23 answer.

24 THE COURT: Okay. I don't know what he's going to
25 ask. So it might be a little early. Maybe we can start to

1 address it so we don't have to come back up here.

2 ATTORNEY SCHROEDER: That would be helpful.

3 ATTORNEY VITT: I'm going to give him the transcript.
4 I actually did quote it. I'm not trying to sort of sideswipe
5 the guy. I'll show him the transcript and ask him, you know --

6 THE COURT: And are you attempting to impeach him?
7 And then I'd like to know what you're impeaching. I don't
8 remember the question that led up to it.

9 ATTORNEY VITT: I can approach the topic generally,
10 but there's also obviously a particular place where he says
11 what I've just said in the question. I'm not sure what the --
12 you know, it might be easier if I get to the question, I think,
13 than going through --

14 ATTORNEY SCHROEDER: Your Honor, respectfully, you
15 can't impeach a witness unless there's an underlying question
16 that is subject to impeachment, and there was not one, and then
17 the question was starting. So I was anticipating, Do you
18 recall testifying in my office, and saying he was starting to
19 quote it. So that was my objection.

20 THE COURT: If you're going to ask him if he made a
21 statement at his deposition and then an inconsistency comes out
22 or then perhaps approaching him, but just to go up there and
23 have him read the deposition transcript would be inappropriate
24 impeachment. So you are going to ask him a question about does
25 he recall making a statement at his deposition, and then, if he

1 says "no" or if he answers and its inconsistent with what's in
2 there, it goes away.

3 ATTORNEY VITT: Okay.

4 ATTORNEY SCHROEDER: Thank you.

5 (Bench conference ends.)

6 BY ATTORNEY VITT:

7 Q. Mr. Herrick, do you recall making a statement at your
8 deposition that we, meaning Dartmouth-Hitchcock, didn't fire
9 doctors. We let them go because we didn't have any need for
10 their work?

11 A. I don't recall specifically saying that, nor the context.

12 ATTORNEY VITT: I'd like to show you what's been
13 marked as ID7. It's your deposition. Let me get you a page
14 number. If you can go to Page 114, Line 21.

15 ATTORNEY SCHROEDER: Can we, for clarity purposes,
16 are you going to ask the question, or are you just the answer?

17 BY ATTORNEY VITT:

18 Q. Are you there?

19 A. I'm on Page 114, yes.

20 Q. Line 21? See where it says, "We didn't fire doctors. We
21 let them go because we didn't have the need for their" --

22 A. I see that, yes.

23 Q. Okay. At the time that the REI division was closed, I
24 believe you were aware that Dr. Porter was reading ultrasounds
25 for the OB/GYN department?

1 A. I believe that's correct, yes.

2 Q. Okay. Did you do anything to inquire about the scope of
3 the work that she was then performing at the OB/GYN department?

4 A. I did not.

5 Q. Do you recall, in connection with the work that was being
6 done to evaluate the REI division, making any inquiries about
7 the scope of Dr. Porter's work that did not involve IVF?

8 A. No. Again, I'd just say that, on Line 21 when I said we
9 didn't fire people, that meant that -- you said we didn't let
10 them go because we didn't fire people, that we don't fire
11 doctors. My intent there was that we don't fire, we didn't
12 fire people for cause, that we shut down the program. That's
13 what I was saying.

14 Q. That was the intent? It doesn't say that, but that's what
15 you're saying that was your intent?

16 A. That we weren't firing people.

17 ATTORNEY SCHROEDER: Object.

18 THE COURT: Overruled. Mr. Vitt, do you want to take
19 the deposition transcript back?

20 ATTORNEY VITT: Sure. I'll take it back. I may have
21 with you one other time to show it to him I'm happy to take it
22 back. Thank you.

23 BY ATTORNEY VITT:

24 Q. Do you know whether, at the time the REI division was
25 closed, whether Dr. Porter was already spending a large

1 percentage of her time doing regular OB/GYN work not related to
2 IVF?

3 A. I did not.

4 Q. The top of this document, Mr. Herrick is something you
5 wrote?

6 A. Yes.

7 Q. Okay. And you say here that, based on your observations
8 and interactions, Misty has been the biggest driver to the
9 dysfunction within the REI. Is that what you wrote?

10 A. That is what I wrote.

11 Q. Okay. Isn't it accurate that you had no observations
12 whatsoever of Misty Porter's conduct?

13 A. That's correct.

14 Q. All right. And it's also true that you really had no, no
15 personal information that provides the basis for that
16 statement?

17 A. Only information that I heard from Dr. DeMars, correct.

18 Q. Okay. So it's not exactly accurate to say it's your
19 observation and interactions?

20 A. It's, it's inarticulate, correct.

21 Q. Well, it's inaccurate, right?

22 A. Yes.

23 ATTORNEY VITT: Nothing further.

24 THE COURT: Okay. Any redirect?

25 ATTORNEY SCHROEDER: Nothing, Your Honor.

1 THE COURT: Okay. Mr. Herrick, you may step down.
2 Okay. We'll take our afternoon break and come back at 2:45.

3 (A recess was taken from 2:26 p.m. to 2:45 p.m.)

4 THE COURT: Okay. Defense may call its next witness.

5 ATTORNEY McDONALD: Defendants call Heather Gunnell.

6 HEATHER GUNNELL,

7 having been duly sworn to tell the truth,

8 testifies as follows:

9 ATTORNEY McDONALD: May I proceed?

10 THE COURT: Yes.

11 DIRECT EXAMINATION BY ATTORNEY McDONALD

12 Q. Hi, Ms. Gunnell.

13 A. Hi.

14 Q. To get started, can you give a little bit of your
15 educational history, starting with college?

16 A. Sure. I have a bachelors of science in management, and I
17 have a masters in public policy.

18 THE COURT: Ms. Gunnell, if I could just ask you to
19 move into the microphone a little bit. Thank you.

20 BY ATTORNEY McDONALD:

21 Q. Are you currently employed?

22 A. I'm self-employed, yes.

23 Q. Were you ever employed by Dartmouth Health?

24 A. Yes, I was.

25 Q. During what time period were you employed by Dartmouth

1 Health?

2 A. From April 2013, I believe, until June of 2023.

3 Q. And what was your role?

4 A. I started as the practice manager in the OB/GYN
5 department, and then I became the director of employee
6 well-being for a couple of years.

7 Q. Practice manager OB/GYN department; is that right?

8 A. That's right. I skipped one. I went from practice
9 manager to the administrative director in OB/GYN.

10 Q. And what year did you become administrative director?

11 A. I think it was near the end of 2017. I don't remember
12 exactly.

13 Q. And what years did you serve as practice manager?

14 A. It would have been 2013 up until I became director, so
15 probably 2017.

16 Q. And both of those roles related to the OB/GYN department,
17 correct?

18 A. That's correct.

19 Q. Can you give us a sense of your duties as the practice
20 manager and administrative director for the OB/GYN department?

21 A. I oversaw all of the day-to-day operations of the clinic.
22 So that included budgets, finance, work flows, overseeing all
23 of the administrative and nursing staff and working with the
24 division directors in the department.

25 Q. So you said that you oversaw the administrative staff and

1 the nursing staff. Did Katy Mansfield report to you?

2 A. She did.

3 Q. Did Kelly Mousley report to you?

4 A. Yes.

5 Q. And who did you report tot?

6 A. I reported, when I started, I reported to the director, so
7 initially Karen Lancaster, and then, ultimately, I ended up
8 reporting to Daniel Herrick when I was the director.

9 Q. When did you leave Dartmouth Health?

10 A. June of 2023.

11 Q. What were the circumstances surrounding your departure?

12 A. I was part of their reduction in force. I was laid off.

13 Q. In your role as practice manager and administrative
14 director of the OB/GYN department, did you receive any training
15 related to policy and procedure?

16 A. Training in regard to policy and procedure? Nothing
17 formal.

18 Q. What about with respect to process improvement?

19 A. Yes, I did.

20 Q. Can you describe the training?

21 A. I went through the Lean Six Sigma program through the
22 Value Institute, which is the part of the organization that
23 handles all the process improvement. So I don't remember how
24 long the program was, but it was a pretty extensive program
25 learning that methodology.

1 Q. Does Dartmouth-Hitchcock, excuse me, have a risk
2 management department?

3 A. Yes, they do.

4 Q. And what's their role?

5 A. I don't know that I could explain the nuance, but their
6 role how I interacted was, when something looked like it might
7 come up against something challenging legally or if there were
8 patient concerns, then we would reach out to them.

9 Q. So it was within the scope of your duties to interact with
10 the risk management --

11 A. Yes.

12 Q. -- department? Did you have any responsibilities with
13 respect to patient relations?

14 A. Yes.

15 Q. Can you describe those responsibilities?

16 A. I worked with patient relations, usually when there were
17 patient complaints. So sometimes those complaints would go
18 into patient relations, who would reach out to me, and
19 sometimes I would hear from patients directly, and then I would
20 reach out to patient relations.

21 Q. And just to orient us, as the practice manager and
22 administrative director of the OB/GYN department, that would
23 encompass all of the divisions underneath the larger OB/GYN
24 department?

25 A. That's correct.

1 Q. Was there any division within the OB/GYN department that
2 required more attention than the other divisions?

3 A. Yes. The REI division took up a lot of my time.

4 Q. And can you explain a little bit about why the REI
5 division took up more of your time than the other divisions?

6 A. There were a lot of inter, like, there was a lot of tough
7 dynamics with that group. There was a lot of team friction,
8 and it just took a lot of time talking to people and nuance and
9 the sort of chaos that surrounded that sometimes.

10 Q. What do you mean when you say chaos and friction?

11 A. There was a dynamic in that group that really split the
12 team. So there were -- I kind of viewed it as having two teams
13 within that division. They didn't often communicate well with
14 one another. The process would differ often between nurses
15 and/or providers, and so, and they didn't always get along. So
16 it was difficult to navigate that with them.

17 Q. When you referenced two teams, do you have a sense of
18 which individuals were on each team?

19 A. Yeah. I mean, it changed over the years, but it was
20 really, like, Dr. Porter, Beth Todd, and Sharon Parent, the
21 nurse, were a very tight unit, and then it tended to be whoever
22 else was in the division.

23 Q. So it would be Dr. Porter, Beth Todd, Sharon Parent, and
24 then everyone else typically?

25 A. That's the way I experienced it, yes.

1 Q. In your role, how often did you meet with the chair of the
2 OB/GYN department?

3 A. That changed over time. So, when I started, it was
4 Dr. Reindollar, and I almost never met with him. When I was
5 practice manager, as Dr. DeMars stepped in, I met with her at
6 least weekly.

7 Q. What do you attribute that sort of change in the frequency
8 of communications to?

9 A. I think a lot of it was just their different style, and
10 there was also a change in administrative director right about
11 that time.

12 Q. Did you discuss the REI division in your meetings with
13 Dr. DeMars?

14 A. Yes.

15 Q. And what, in particular, would you discuss about the REI
16 division with Dr. DeMars?

17 A. It depended really on what was going on, but it often
18 circled around the challenges that the team was facing and how
19 we could help fix those.

20 Q. Did you have any understanding as to the relationship
21 between Dr. DeMars and Dr. Porter?

22 A. Yeah. My understanding is that they worked together for a
23 long time and that they were also friends outside of the
24 workplace.

25 Q. From your perspective, did the fact that Dr. DeMars and

1 Dr. Porter were friends have any impact on the way Dr. DeMars
2 led the department?

3 A. Yes.

4 Q. Can you explain?

5 A. I think, in general, I mean, Dr. DeMars is a great
6 clinician and has a really big heart, so she really puts people
7 first in general, but it seemed to be more difficult because
8 they seemed to be pretty good friends, and so I think it was
9 harder for Dr. DeMars to be able to step back from that.

10 Q. So you just testified about some friction, and I think you
11 used the word "chaos" with respect to the REI division. Was
12 that the case in the 2014 to 2016 timeframe as well?

13 A. I wouldn't use the word "chaos" for that timeframe. I
14 know that there was friction, but it certainly was not taking
15 up as much of my time, and it didn't seem quite as drastic.

16 Q. In the 2014 to 2016 timeframe, do you have a sense of
17 whether the providers within the REI division were able to
18 communicate with one another effectively?

19 A. From 2014 to 2016? It seemed to be better, but I don't, I
20 wasn't involved quite as much, so I don't know.

21 Q. Why were you involved less during that time?

22 A. I think there were several reasons. One, I was relatively
23 new in the position. So, in that 2014 to 2016 timeframe,
24 Dr. Reindollar, who was the chair, was also in the REI
25 division, and so there was more focus there, and it wasn't, it,

1 frankly, it just wasn't quite as bad. There wasn't quite as
2 much infighting, so I wasn't as involved.

3 Q. So you're referring, when you refer to the period that you
4 felt like there was less infighting, you're referring to the
5 period when Dr. Reindollar was the chair of the department?

6 A. Yes.

7 Q. Okay. Is it possible Dr. DeMars was chair of the division
8 during that timeframe?

9 A. I think I might have misheard your dates. Could you
10 repeat that, please?

11 Q. Sure. I'm asking specifically about 2014 to 2016.

12 A. She was interim during that time, so it is possible that
13 I'm mixing up my timeframes, yes.

14 Q. But, to be clear, the time that you're talking about where
15 there was less sort of friction, that would have been the
16 Reindollar era, so to speak?

17 A. That's right.

18 Q. Subsequent to that when Dr. DeMars was the chair of the
19 OB/GYN department, how did you feel the dynamics of the REI
20 division were?

21 A. It started to shift over time, so when new providers
22 started coming in, so it got to where it was just more
23 complicated and they didn't seem to communicate as well.

24 Q. During this timeframe, did patient complaints come to you?

25 A. During which timeframe?

1 Q. When Dr. DeMars was the chair.

2 A. Some, some of them would come to me, yes.

3 Q. Do you recall any patient complaints with respect to the
4 REI division specifically?

5 A. Yes, I do.

6 Q. And were there any providers in particular that the
7 complaints were about?

8 A. I would get complaints about all three of them.

9 Q. And can you describe generally the nature of those
10 complaints?

11 A. Often, the complaints were -- I don't remember all of the
12 details, but many of them were around communication. So I'm
13 working with one provider and one nurse, and this was the plan
14 they gave me, and then I called and talked to somebody else,
15 and they said it should be something different. So I got some
16 of those complaints. I got some complaints, which was not
17 uncommon, that a patient just didn't like a provider's bedside
18 manner, so to speak. So there were some of those complaints.
19 A lot of it was around the miscommunication during that
20 timeframe, though.

21 Q. Did the REI division receive more or less or the same
22 amount of patient complaints than the other divisions you were
23 responsible for?

24 A. You know, I don't remember the exact numbers. It felt
25 like more. Yeah.

1 Q. Would you describe there as being a friction in any of the
2 other divisions that you managed?

3 A. There was some friction in some of the other divisions but
4 nothing compared to the REI division.

5 Q. Do you have a sense of how much time you spent managing
6 the REI division as compared to the other divisions you were
7 responsible for?

8 A. Like, as a percentage?

9 Q. As best you can.

10 A. Okay. It seemed to me that there were some weeks when all
11 I did was deal with REI. It was very frustrating to have so
12 much attention disproportionate one area of the department.

13 Q. From your perspective, did Dr. Porter contribute to the
14 friction that you described?

15 A. Yes.

16 Q. How so?

17 A. Dr. Porter could be really difficult to work with if she
18 wasn't getting her way. So there was some challenges with
19 communication with the other providers, and there just seemed
20 to be -- it was really challenging to make any improvements in
21 the department, to bring people together, to try to come to
22 some sort of collective agreement, and she contributed in that
23 way.

24 Q. How did Dr. Porter get along with the nursing staff within
25 the REI division?

1 A. Depended on the nurse.

2 Q. Nurses other than Beth Todd and Sharon Parent, how did she
3 get along with those nurses?

4 A. They, she got along best with Sharon and Beth. Some of
5 the other nurses she could work better than others, but there
6 was a lot more friction with the other nurses that I was aware
7 of.

8 Q. Are you aware of issues with the REI division's ability to
9 recruit and retain nurses?

10 A. Yes, I am.

11 Q. Do you have any opinion as to whether Dr. Porter's
12 behavior impacted the ability to retain nurses in the REI
13 division?

14 A. So I would say that, collectively, the dynamic in that
15 division made it difficult to retain nurses, and I do know that
16 there were some of the nurses that felt excluded or kind of
17 ostracized by Dr. Porter and Sharon as a team.

18 Q. Beyond those kind of interpersonal issues that you just
19 described, are there any other factors that you think played
20 into the REI division's ability to recruit and retain nurses?

21 A. Yes. It was a different role as a nurse than many of them
22 in the clinic. So it did require call on weekends and
23 holidays. There was a higher level of expertise that was
24 required with those nurses, and the patient population
25 required, in my opinion, like, a different level of compassion

1 and empathy. So there were a lot of factors that made that a
2 challenging role to recruit for.

3 Q. And I think you mentioned that the REI nurses required a
4 higher level of expertise. Can you explain that a little bit
5 more?

6 A. Well, my not being a clinician, my understanding was that
7 they had to be able to do work with procedures. The timing of
8 the care required a lot of precision. They, it was a lot more
9 than being a generalist RN in the division, and it required
10 quite a lot of training.

11 Q. Training specific to REI work?

12 A. That's correct.

13 Q. Are you familiar with efforts that the REI division made
14 to recruit nurses?

15 A. Yes.

16 ATTORNEY McDONALD: I'll ask you to take a look at
17 Exhibit A9, and my notes indicate that this has already been
18 admitted. I'll ask Mr. Howe to confirm that.

19 COURTROOM DEPUTY: Yes.

20 ATTORNEY McDONALD: Could I please ask that that be
21 published to the jury and the Witness?

22 BY ATTORNEY McDONALD:

23 Q. Give you a moment to review that. I'm going to ask you
24 specifically about the information on the second page, okay?

25 A. Okay.

1 Q. Let me back up a little bit for a moment. This is an
2 email that you sent to Katy Mansfield on November 4th 2016,
3 correct, the top of the email?

4 A. That's correct, yes.

5 Q. And, turning to the second page and the final large
6 paragraph there, it says, "OB/GYN is requesting an expedited
7 posting of a staff nurse position in our REI department for the
8 following reasons". The first bullet says, "The position is
9 one of three and is currently vacant", and then final bullet in
10 that paragraph is, "One of our two remaining nurses retires as
11 of December 2nd 2016".

12 Do you know who, which nurse that that last bullet point
13 is referring to?

14 A. That would have been Sharon Parent.

15 Q. So this is suggesting that there's a need for an
16 additional nurse above and beyond Sharon Parent, correct? That
17 is, even before Sharon Parent retires, there was a need for
18 another nurse, correct?

19 A. That's my recollection.

20 Q. Okay. So, if Sharon Parent had not retired, there would
21 still be a need for another nurse?

22 A. Yes.

23 Q. All right. We can take that one down. Thank you. What
24 is the Value Institute?

25 A. The Value Institute is the group in the organization that

1 works on process improvement projects. So they do all of the
2 training like the one I went through, and then they could also
3 help with focused process improvement projects.

4 Q. At some point, did the Value Institute become involved
5 with the REI division?

6 A. Yes, they did.

7 Q. And how did they become involved?

8 A. I called them.

9 Q. Why did you call them?

10 A. I called them you because I felt like the situation had
11 gotten so complicated and we just weren't making any progress.
12 So I reached out to them almost as a last-ditch effort to see
13 if we could get some outside support to help bring that team
14 together.

15 Q. And did the Value Institute agree to meet with members of
16 the REI division subsequent to your call to them?

17 A. Yes.

18 Q. How did those meetings go?

19 A. I can only speak to the ones I was in, some of the group
20 meetings. There was a lot of work that was done to look at the
21 difference in processes to try figure out how we could create
22 efficiencies. I would say the, well, they obviously did not go
23 well, because it didn't work, but I think the meetings
24 themselves were a mixture of productive and frustrating.

25 Q. And why do you say that they were, in part, frustrating?

1 A. I, my perception was that the providers were just simply
2 not willing to do the type of compromise necessary to come
3 together.

4 Q. And, when you say the providers, who are you referring to?

5 A. I'm referring to Dr. Porter, Dr. Hsu, and Dr. Seifer.

6 Q. Did the Value Institute work with the REI division in
7 2016?

8 A. Yes, late fall, I believe.

9 Q. And did that work continue into 2017 as well?

10 A. Yes, it did.

11 Q. Beyond the work the Value Institute was doing, at some
12 point, were weekly meetings instituted in the REI division to
13 try to repair some of the issues you've described?

14 A. Yes. I, I believe it was after the Value Institute
15 started doing time studies but before the big meetings started,
16 and so the REI division started having their weekly team
17 meetings again.

18 Q. Could I please ask that Defense Exhibit N be displayed to
19 the Court and to the Witness and the litigants? And I don't
20 believe this has been admitted yet. If it's easier for you to
21 read, there's also a hard copy in a binder, whatever you
22 prefer.

23 A. This one?

24 Q. It would be one of the black binders, and it would be
25 Volume 1, if that's easier for you to review.

1 A. Volume 1? Okay.

2 Q. Tab N. Have you had a chance to review it?

3 A. Yeah, I have.

4 Q. Do you recognize this document?

5 A. Yes.

6 Q. Is this an email that you circulated with meeting minutes
7 from one of the meetings we just described?

8 A. Yes.

9 ATTORNEY McDONALD: I move to admit Exhibit N.

10 THE COURT: Any objection?

11 ATTORNEY NUNAN: No objection.

12 THE COURT: Okay. It's admitted, Exhibit N.

13 BY ATTORNEY McDONALD:

14 Q. And I would ask you turn to the second page and
15 specifically looking at Paragraph D, which is around the middle
16 of the second page.

17 A. Okay.

18 Q. And it says, "Heather State of the State". Are you the
19 Heather that that refers to?

20 A. I am.

21 Q. Okay. And then it says, "We've heard some patient
22 complaints about their perception of communication between team
23 members. We are also having issues with workload, work flow
24 for the nurses". Did I read that correctly?

25 A. That's correct.

1 Q. And then it says, "Heather has reached out to the Value
2 Institute for help with process improvement. Hillary will
3 spend next week observing our baseline, nurses, Donna, Beth.
4 She'll do observation, data gathering, and point out areas that
5 we need to focus".

6 So we talked about this a little bit, but are your
7 references to communication between team members and patient
8 complaints, does that refer, to your understanding, to the
9 inability to communicate among the providers in the REI
10 division?

11 A. Yes. But I think it also included the nurses to some
12 degree.

13 Q. Okay. Who is Hillary in the quotes below? Is she from
14 the Value Institute?

15 A. Yes.

16 Q. So this email is dated May 20th 2016. So is it fair to
17 assume that work with the Value Institute began around May 20
18 of -- oh, I'm sorry. I apologize. Could we have this
19 published to the jury? Thank you. Sorry.

20 BY ATTORNEY McDONALD:

21 Q. So does this, am I right that that suggests that the work
22 with the Value Institute began at least as early as May of
23 2016?

24 A. Yes.

25 Q. Okay. And, in that time period, do you have a sense of

1 what work the Value Institute was doing with the REI division?
2 A. My recollection is that they started with kind of a time
3 study where they followed the nurses and the secretaries at the
4 time to get a sense of what that work flow looked like.

5 ATTORNEY McDONALD: Thank you. You can set that
6 document aside. I'm going to ask you next to look at
7 Defendant's Exhibit P, which should be in the same binder, just
8 tab P. This one has also not been admitted. So I'd just ask
9 that this just be displayed to the litigants, the Court, and
10 the Witness at this time.

11 ATTORNEY VITT: Could we hear the letter again? I'm
12 sorry.

13 ATTORNEY McDONALD: P.

14 ATTORNEY VITT: Okay. That's why.

15 THE WITNESS: Okay.

16 BY ATTORNEY McDONALD:

17 Q. Have you had a chance to review?

18 A. I have.

19 Q. Do you recognize this document?

20 A. Yes.

21 Q. Is this a document that you sent to members of the REI
22 division with meeting minutes from a May 25, 2016 REI meeting?

23 A. Yes.

24 ATTORNEY McDONALD: Move for the admission of Exhibit
25 P.

1 THE COURT: Any objection?

2 ATTORNEY NUNAN: No objection.

3 THE COURT: Exhibit P is admitted. Would you like it
4 published?

5 ATTORNEY McDONALD: Yes, please. Thank you.

6 BY ATTORNEY McDONALD:

7 Q. So about midway through the first page there it says,
8 "Participating by phone, Heather Gunnell". That's you, right?

9 A. That's me, yes.

10 Q. And, looking down the page a little bit at sub.2, about
11 the final 25 percent of the page, "We have an IVF RN
12 coordinator candidate who is coming for interviews at some
13 point TBD. Katy will send out a notice about that".

14 Does this suggest to you that the efforts to recruit
15 nurses were discussed at this meeting?

16 A. Yes.

17 Q. And, again, this meeting is May 25, 2016, correct?

18 A. That's correct.

19 Q. And 2C states that, "We've had this position open for a
20 month, and we've only had one candidate, and we're not getting
21 the volume of candidates that we're used to getting".

22 Is that accurate from your perspective?

23 A. Yes.

24 Q. And then at Part D it says towards the end of that, 2D,
25 "Sharon pointed out that the optimal situation would be three

1 full-time nurses". Would you agree with that assessment?

2 A. Yes.

3 Q. Turning to the second page of that document, Paragraph 5,
4 which is about the middle of the page, beginning with
5 discussion, "Discussion about basic communication within the
6 division and with patients. Let's all work on the quality of
7 every communication we have with each other" and then it's
8 bolded, "be inclusive of any provider that may come in contact
9 with the patient so they are all kept informed". Did I read
10 that correctly?

11 A. You did.

12 Q. Do you remember this being an issue with respect to
13 providers in the REI division?

14 A. Yes.

15 Q. Can you explain that a little bit?

16 A. Yeah. I'm thinking about how to think about that. So I
17 think it was fairly common for providers to send communication
18 to either, the nurse that they worked with primarily or just
19 their kind of team, as instead of sending it to all of the
20 providers. So I think there was a lot of, like, friction
21 around this idea of who should be included in which
22 communications.

23 Q. All right. Thank you. You can set that document aside as
24 well. I'm going move next to Defendant's Exhibit Q. Has also
25 not yet been admitted, so I'd just ask for now it be published

1 just to the Court, the litigants, and the Witness. And it's
2 Tab Q in your binder. Had a chance to review.

3 A. Okay.

4 Q. Do you recognize this document?

5 A. Yes.

6 Q. And this meeting minutes from a June 2016 REI meeting?

7 A. That's correct.

8 Q. And the bottom third of the page, Paragraph 2 -- oh, could
9 I move for the admission of Exhibit Q?

10 THE COURT: Any objection?

11 ATTORNEY NUNAN: No objection.

12 THE COURT: Okay. Exhibit Q is admitted.

13 ATTORNEY McDONALD: Can I also ask that this be
14 published to the jury? Got it now.

15 BY ATTORNEY McDONALD:

16 Q. The bottom third of the page beginning with, "Follow-up,
17 slash, update", so, "Follow-up, slash, update on IVF RN
18 coordinator candidate. The job is a 40-hour position, plus
19 weekend call, has been post for four to five weeks. Per Beth
20 and Casey, we have had eight RN coordinators in our program
21 here over the past 12 to 13 years. People have left because
22 didn't want to do call/hours, not a good fit, unsuccessful at
23 job. Common themes of why: Lack of understanding of job,
24 hours, and work needed". And then attributes this quote to
25 you, Heather: "Job also takes a certain type of personality

1 and a close working team". Did I read all of that correctly?

2 A. Yes.

3 Q. And is all of that information accurate from your
4 perspective?

5 A. Yes.

6 Q. And do you recall having the opinion or expressing the
7 opinion that the job takes a certain type of personality and a
8 close working team?

9 A. Yes.

10 Q. Can you expound on that a little bit?

11 A. Yeah. I think nurses in this division needed to be able
12 to have a high level of kind of touch and compassion with the
13 patient. So some of the these patients were high-maintenance,
14 but I don't say that in a derogatory way. They just required a
15 lot more attention because of all of the details. And, also,
16 because that team was so complicated, that I think it required
17 a personality that could be a good mediator that could also
18 work really autonomously because the role required that, and
19 yet they still needed to be able and willing to be part of a
20 cohesive team. So it was a complicated position for us to
21 recruit for.

22 Q. Thank you. You can set that document aside as well.
23 Continuing with the theme of meeting minutes, I'm going to ask
24 you to take a look at A17, which I have a note already has
25 been admitted. I ask that this be published to the jury.

1 So the date on this document is December of 2016, correct?

2 A. That's correct.

3 Q. So this is roughly seven months after the first meeting
4 minutes that we looked at, correct?

5 A. Yes.

6 Q. Turning to Paragraph C, which is in the lower half of this
7 first page, "We've had open positions for seven to eight
8 months, and we haven't gotten applicants for a while". Did I
9 read that right?

10 A. Yes.

11 Q. Does that refer to nursing positions?

12 A. Yes, in the REI division.

13 Q. In the REI division? Do you recall that positions would
14 be posted for as long as eight months without applications?

15 A. I don't remember it, but I remember it being a long time
16 and that Katy, the nurse manager, was having a really difficult
17 time finding candidates.

18 Q. And then, moving up in this document to point 1, "We need
19 to discuss how to pull together and reset everything in the
20 month of January. Heather has a plan". Do you know what that
21 refers to?

22 A. I think that line is funny, that that's how that was
23 categorized. I believe that refers to the plan to do what we
24 called the pause on accepting new patients for the month of
25 January and to only maintain the patients currently in cycle,

1 and the goal there was to free up enough time and space to
2 implement some of the recommendations from the Value Institute.

3 Q. So I think you just testified, and correct me if I'm
4 wrong, that there would be a pause on new patients, or would
5 there be a pause on old patients as well?

6 A. My recollection is that anyone who wasn't in active cycle
7 we would not start so that there would be enough of a break in
8 the clinical care.

9 Q. And can you give us a sense of why that suggestion was
10 made to pause patients during the month of January?

11 A. I'm trying to remember the details of that. It's been so
12 long. I think we were down nurses. The team still had not
13 come together around better work flows. There were still
14 communication issues, and what I remember is that the idea was
15 we needed to be able to -- we can't fit this in around the
16 margins of the day-to-day work, and we have to be able to call
17 a time out and let this group come together and see if we can
18 streamline some of this work.

19 Q. And was this proposed pause implemented?

20 A. Yes.

21 Q. One more meeting minutes for you to look at. Could you
22 take a look at Defendant's Exhibit A22, which should still be
23 in the same volume of your book? This one has not been
24 admitted yet, so if I could just ask that this be just
25 displayed for the Court and the litigants.

1 Have you had a chance to review?

2 A. Yes.

3 Q. Do you recognize this document?

4 A. Yes.

5 Q. This is a document from David Seifer sent to a number of
6 folks on 12/28/2016, subject "REI Minutes Wednesday 12/28". Is
7 that what this is?

8 A. Yes, yeah.

9 ATTORNEY McDONALD: I move for the admission of A22.

10 ATTORNEY NUNAN: No objection.

11 THE COURT: Okay. A22 is admitted.

12 ATTORNEY McDONALD: And could this please be
13 published for the jury?

14 BY ATTORNEY McDONALD:

15 Q. Taking a look at the first page, David, I assume David
16 wrote this email. He writes, "Please note Alison Mumford will
17 be here to observe", and then lists a number of dates.

18 Who is Alison Mumford?

19 A. She was in the Value Institute and was working with us.

20 Q. Do you recall her coming to observe in the January
21 timeframe on a number of dates?

22 A. I know she did. I don't remember the details.

23 Q. Fair enough. Turning to Page 2 of this document, are
24 these meetings minutes from what looks to be December 28 of
25 2016?

1 A. Yes.

2 Q. Okay. Looking at Paragraph 1, this appears to be related
3 to ongoing efforts to recruit nurses; is that correct?

4 A. That's correct.

5 Q. And, "Barbara Dennis is our recruiter working from home
6 right now". Do you recall a recruiter being brought on to find
7 nurses?

8 A. Yes.

9 Q. And it says that, "Barbara Dennis will go back to the last
10 two years of applicants, reach out to old applicants for REI
11 positions to see if there's anyone else out there. Could also
12 look into a signing bonus, which might not help with retention
13 but could help". Did I read that correctly?

14 A. Yes.

15 Q. And then, "Also looked at ad agency, looked at pricing and
16 journals", and the first bullet there is ASRM, and the final
17 bullet there is, "Total of \$2,000 for advertising. Would need
18 leadership to proceed".

19 Do you recall whether a nurse or a posting for a nurse job
20 was submitted to ASRM?

21 A. Yes, I remember that.

22 Q. And do you recall whether there was a cost associated with
23 that posting?

24 A. I don't remember.

25 Q. All right. And then Subparagraph F of 1, "Plan for

1 advertising: Facebook, advertising in reproductive nursing
2 sites mentioned above, Indeed.com targeting reproductive nurses
3 and reproductive nurse groups". Did I read that correctly?

4 A. Yes.

5 Q. Do you have a memory of advertising on these various
6 sites?

7 A. Yeah, I remember Katy working on that. I don't remember
8 all of the details around this, but we put in a lot of effort
9 to try to recruit nurses.

10 Q. All right. Now I'll ask you to turn to the third page of
11 this document, the second half of the page, Point L which
12 begins with the word "Pavel". Who is DBS, do you know?

13 A. I think that's David Seifer.

14 Q. And under A.3 it says, "The ultimate goal is for us to
15 works as one team, not three teams". Is that consistent with
16 what you've testified to today with respect to the teams in the
17 REI division?

18 A. Yes.

19 Q. And so does that suggest to you that the Value Institute
20 was focused on trying to be one team rather than three teams?

21 A. Yes.

22 Q. At the bottom of this page, Point F, "Katy after the
23 shadowing. They came back and said, You guys obviously don't
24 communicate well, and so we had a retreat".

25 Is the "they" there the Value Institute?

1 A. I believe so.

2 Q. So fair to say that the Value Institute concluded that
3 there were communication issues in the division?

4 A. Yes.

5 Q. All right, thank you. You can set that document aside
6 that will be the last meeting minutes I bother you with. I'll
7 ask you now to turn to Document Defendant's Exhibit A25, and
8 I'll give a minute to review that.

9 A. Okay.

10 Q. I now ask that that be published to the litigants and the
11 Court as well. Do you recognize this document?

12 A. Yes, I do.

13 Q. Is this an email from Alison Mumford to a number of
14 people, subject "Action Plan"?

15 A. Yes.

16 ATTORNEY McDONALD: Move to admit A25.

17 THE COURT: Any objection?

18 ATTORNEY NUNAN: No objection.

19 THE COURT: Okay. A25 is admitted.

20 BY ATTORNEY McDONALD:

21 Q. I think you testified, correct me if I'm wrong, that
22 Alison Mumford was associated with the Value Institute.

23 A. Yes.

24 Q. So do you have a sense of what this email is?

25 A. My sense of this email is that it included the summary of

1 a lot of work they did observing the team with some
2 recommendations.

3 THE COURT: Ms. McDonald, would you like that
4 published?

5 ATTORNEY McDONALD: Oh, yes. Thank you.

6 THE COURT: Okay.

7 BY ATTORNEY McDONALD:

8 Q. And I'll ask you to turn to Page 3 of this document. So
9 at the bottom it will say A25. And the ground rules are,
10 include speaking clearly, listening, being respectful. Is
11 there a reason, from your perspective, that that needed to be,
12 that instruction needed to be given to the REI division?

13 A. Yeah. I mean, I think it's always good advice when you're
14 doing a group session like this to have those, but I think this
15 group in particular did not do a good job of listening to one
16 another.

17 Q. And did you attended some of these Value Institute
18 meetings; is that correct?

19 A. Yes, I did.

20 Q. And, from your perspective in those meetings, did that
21 group have difficulty speaking with one person speaking at a
22 time, listening, and being respectful?

23 A. I don't remember the details of the day-to-day in those
24 session. I remember it feeling sort of tense and often feeling
25 like it was just like they weren't actually speaking to each

1 other but sort of past each other, even if they weren't
2 interrupting.

3 Q. That would be all of the providers that attended?

4 A. That's correct.

5 Q. Thank you. Did the Value Institute make any findings or
6 reach any conclusions about the future of the REI division?

7 A. About the future of the division?

8 Q. Or just general about the REI division and its function.

9 A. Yeah, so there were some, if I remember correctly, very
10 clearly that there were different work flows depending on which
11 team in the division was working on. So they recommended
12 having to streamline it to reduce the variation. They also
13 recommended figuring out some communication. I mean, it was
14 just a mess. They couldn't get along, and it was really
15 difficult to be able to navigate that, and patients were being
16 impacted. So they had a number of recommendations. I don't
17 remember all of the details.

18 Q. Thank you. Going back a little bit to our discussion
19 earlier about the pause that was put in place at the end of
20 December of 2016, beginning of 2017, could I ask you to take a
21 look at Exhibit A18? That should also be in Volume 1 of your
22 book, and I would ask it to be published to the Court and the
23 litigants.

24 A. Okay.

25 Q. Do you recognize this document?

1 A. Yes, I do.

2 Q. And is this an email and attachments you sent to a number
3 of people in the REI division on December 15th 2016?

4 A. That's correct.

5 ATTORNEY McDONALD: Move for the admission of A18.

6 THE COURT: Any objection?

7 ATTORNEY NUNAN: No objection.

8 THE COURT: Okay. A18 is admitted.

9 ATTORNEY McDONALD: Could this be published to the
10 jury?

11 BY ATTORNEY McDONALD:

12 Q. Please take a look at the second page. You testified
13 earlier that the decision was made to pause new patients at the
14 end of 2016 and there were a number of reasons for that
15 decision, correct?

16 A. That's correct.

17 Q. Okay. I'll ask you to take a look at the first paragraph
18 on Page 2. I'll ask you to read that first paragraph,
19 beginning with "situation". If you wouldn't mind reading it
20 out loud. I wasn't clear. Thank you.

21 A. It says, "Situation. Over the last year, REI, a division
22 of the OB/GYN at Dartmouth-Hitchcock, has struggled.
23 Challenges have included tough team dynamics, new leadership,
24 staff on leave, organizational layoffs that have affected the
25 team as well as other staff attrition. Currently, REI has only

1 one nurse and is having significant difficulty recruiting new
2 nurses, partly due to the difficult team environment and partly
3 due to the specialized knowledge needed. At the same time, the
4 REI team has, over the past three to four months, had a highly
5 successful pregnancy rate at 90 percent."

6 Q. Is all that accurate from your perspective?

7 A. Yes.

8 Q. All right. Now turning to the paragraph that begins with
9 "assessment", if I could ask you to read that paragraph out
10 loud.

11 A. Okay. "Assessment. Given the work and the team
12 environment, possible solutions include shutting down the REI
13 department or moving a significant amount of patient cycle
14 management to the Bedford location. Given the high pregnancy
15 rate, it has been determined by the section chair, VP
16 Dr. DeMars, that they would like to pause in order to reset the
17 division in order to appropriately move forward".

18 Q. Do you recall discussions about the possible shutting down
19 of the REI division in as early as December of 2016?

20 A. Yes.

21 Q. And can you describe how those conversations came about or
22 how you became aware of those conversations, I should say?

23 A. So I met with Dr. DeMars weekly, and this division was
24 usually the topic of conversation, and so that is how I became
25 aware of it. I know it was after the work, a lot of work with

1 the Value Institute, although we did still, we were still
2 working with them in 2017 as well.

3 Q. Thank you. In your role as practice manager of the OB/GYN
4 department and administrative director of the OB/GYN
5 department, were you familiar with the nurse practitioners?

6 A. Yes.

7 Q. And, in particular, are you familiar with Beth Todd?

8 A. Yes.

9 Q. Do you know whether she performed work in the REI
10 division?

11 A. She did.

12 Q. Do you know whether she was also appointed in the OB/GYN
13 generalist division?

14 A. Yes, she was.

15 Q. I'm going to ask you to take a look at C13, which has
16 already been admitted, and I'm going to specifically ask that
17 Page 12 of C13 be published to the jury and to the litigants
18 and the Court.

19 So take a look at this chart, and I should give you some
20 context. This relates to an exhibit that's already been
21 admitted related to a severance agreement. This is attached to
22 that document, and, at the top of this document, it says, "The
23 following chart provides a list of the job titles for those
24 positions considered for elimination and, if eligible, an offer
25 of severance in connection with the decision to close the

1 reproductive endocrinology and infertility program".

2 Taking a look at that chart -- before I go there,
3 actually, the first star below that chart suggests that, "A
4 single asterisk indicates that employee primarily worked
5 outside of the REI program and the employee's duties were
6 reassigned such that the employee was not ultimately selected
7 for layoff". Did I read that correctly?

8 A. That's correct.

9 Q. And it looks like there's only one individual in this
10 chart that that applies to, and it's the first individual
11 listed in that chart. Would you agree with me?

12 A. That's right.

13 THE COURT: So the monitor over there is flickering
14 on and off, and the exhibit is appearing and disappearing. We
15 can ask Mr. Howe to work his technical expertise.

16 ATTORNEY McDONALD: Could you please? Thank you very
17 much.

18 THE WITNESS: Must be a different binder than this
19 one.

20 ATTORNEY McDONALD: That probably is a different
21 binder. May I approach?

22 THE COURT: Yes.

23 THE WITNESS: Thank you.

24 BY ATTORNEY McDONALD:

25 Q. You may not have seen what I was referring to, but, "A

1 single star indicates that employee primarily worked outside of
2 the REI program". Did I read that correctly?

3 A. Yes, you did.

4 Q. And you see at the top the first individual listed in this
5 chart, "ADV prac NRS". Do you know what that refers to?

6 A. That refers to the APRN, so Beth Todd.

7 Q. So that's Beth Todd from your perspective?

8 A. Yes.

9 Q. Okay. So is it your understanding that Beth Todd
10 primarily worked outside the REI program?

11 A. I don't remember the exact FTE allocation, but this tells
12 me it was at least .5.

13 Q. Thank you. Switching gears a little bit, as I'm sure
14 you're aware, the REI division closed in May of 2017. Did you
15 support the decision to close the REI division?

16 A. Yes, I did.

17 Q. Can you tell us why?

18 A. I think that, you know, ultimately, I think the division
19 was beyond repair. So the providers simply were not willing to
20 compromise or come together. We had lost the last fully
21 trained nurse, and there was only one RN, and, from my
22 perspective, it just wasn't, it wasn't safe for patients, and I
23 couldn't see how we could fix it quickly enough.

24 Q. Do you know whether others in the OB/GYN department agreed
25 with those sentiments?

1 A. I know I had conversations with Dr. DeMars about it quite
2 a bit. I think it probably depended on who we were talking to.

3 Q. And, now, as you sit here today and you look back on this
4 decision, do you still think that closing the division was the
5 right decision?

6 A. Yes, I do.

7 Q. Do you think that the decision to include Dr. Porter in
8 the terminations associated with the closure was the right
9 decision?

10 A. Yes, I do.

11 Q. And why do you say that?

12 A. I don't, I don't actually think that restarting that
13 program with her would have been successful. I don't know that
14 she would have supported a division director leading her.

15 Q. And can you expand on that a little bit?

16 A. In my observation, Dr. Porter wanted to be the person in
17 charge, and so I don't have any reason to believe she would
18 have supported somebody in that role.

19 ATTORNEY McDONALD: Thank you. If I could just have
20 one moment?

21 THE COURT: Yes.

22 ATTORNEY McDONALD: Thank you. Nothing further.
23 Thank you.

24 THE COURT: Okay. Cross-examination?

25 CROSS-EXAMINATION BY ATTORNEY NUNAN

1 Q. Hi, Ms. Gunnell. I'm Sarah Nunan. We met at your
2 deposition.

3 A. I vaguely remember, yes.

4 Q. Would you describe Sharon Parent as always professional
5 and very careful with her words?

6 A. Yes, I would.

7 Q. Those are your words, aren't they?

8 A. Probably, yes.

9 Q. And do you remember that she gave one year's notice that
10 she was leaving?

11 A. I do remember.

12 Q. Yeah. So that was about December of 2015?

13 A. Yes.

14 Q. Great. And do you remember that she intended to come back
15 and work per diem?

16 A. I don't remember that that was the intention. I remember
17 it being talked about.

18 Q. By her by someone else?

19 A. By, I don't remember exactly, but it was a topic of
20 conversation in the division.

21 Q. Is it your memory that Dr. Porter only attended about 50
22 percent of the Value Institute?

23 A. I don't remember exactly what -- I don't think she was at
24 all of them.

25 Q. Right.

1 A. Right.

2 Q. And were you aware that she asked to have them moved so
3 that she could attend at times because of her disability?

4 A. I don't remember that.

5 Q. You were the practice manager, so you were on the
6 operational side, correct?

7 A. That's correct.

8 Q. We heard before that you were paired with the chair of the
9 OB/GYN department, Leslie DeMars; is that right? She was on
10 the clinical side, you were on the operations side?

11 A. Yes, that's correct.

12 Q. Great. And you reported up to Daniel Herrick?

13 A. Yes. When I, once I was the director and in that interim
14 time when there was no director, yes, I reported up to him.

15 Q. Okay. And, as practice manager, did you meet with him
16 weekly?

17 A. No.

18 Q. And did you meet with him quarterly to review the budget?

19 A. Yes. I don't remember, like, a specific cadence of
20 meeting.

21 Q. It was sporadic?

22 A. Correct.

23 Q. Got it. And did Kelly Mousley report to you? She was the
24 scheduler?

25 A. She was the administrative supervisor, not the scheduler,

1 but, yes, she did report to me.

2 Q. Okay. Was she in charge of the scheduling?

3 A. She was in charge of overseeing the scheduling
4 secretaries.

5 Q. Right.

6 A. Yeah.

7 Q. And did you report in the summer of 2016 to Daniel Herrick
8 about the REI division?

9 A. I don't remember the details.

10 Q. Okay. If I said to you that you reported in the summer of
11 2016 that there was an inordinate, inordinately high staff
12 turnover, customer complaints, three silos, and a need for the
13 Value Institute, does that sound somewhat familiar about what
14 you told Daniel Herrick in the summer of 2016?

15 A. Yes, I did tell him we were engaging the Value Institute.

16 Q. And by customer complaints, did you mean patients when you
17 said that? Do you have any idea?

18 A. It would have been patients.

19 Q. Patients, not customers?

20 A. Yeah, correct.

21 Q. Okay. And so were you aware that, in the beginning of
22 June of 2016, that there was an eleven-page assessment written
23 about Dr. Hsu and his competence?

24 ATTORNEY McDONALD: Objection, outside the scope.

25 THE COURT: Overruled.

1 THE WITNESS: Can you repeat that, please?

2 BY ATTORNEY NUNAN:

3 Q. Sure. Were you aware that, at the beginning of June 2016,
4 there was an eleven-page assessment written about Dr. Hsu and
5 his competence?

6 A. I never saw it. I remember Leslie mentioning that there
7 was something about that. I didn't know it was 11 pages.

8 Q. Okay.

9 A. Yeah.

10 Q. But you were aware that it was written?

11 A. I don't remember. I remember hearing that there were
12 complaints about that. I don't remember knowing that there was
13 a report written.

14 Q. Complaints about that, what did you mean, complaints about
15 that?

16 A. So I know that it was talked about a lot that people, that
17 Dr. Porter talked a lot about Dr. Hsu's competence.

18 Q. Did Dr. DeMars tell you that there was an eleven-page
19 assessment written about his incompetence?

20 A. I don't remember that.

21 Q. Okay. And would you agree that incompetence creates chaos
22 and problems?

23 A. In general?

24 Q. With a physician, if there is a physician that is
25 incompetent, do you think, within an operation, that would

1 create chaos and problems?

2 A. It certainly could. I would say that those problems
3 existed prior to Dr. Hsu in some cases.

4 Q. Is the fact that there was a report written about Dr. Hsu
5 that you had some knowledge of, is that something that you
6 would report up to Daniel Herrick?

7 A. Again, if that's on the clinical competency side, that
8 would have been Dr. DeMars's realm, and that would not have
9 been something that I would have been actively involved in.

10 Q. Because you're on the operational side?

11 A. That's correct.

12 Q. Okay. And were you aware that, at the end of July in
13 2016, that Dr. DeMars came to the conclusion that David Seifer
14 was clinically incompetent?

15 A. No.

16 Q. You weren't aware of that?

17 A. That she said he was?

18 Q. Clinically incompetent.

19 A. No.

20 Q. Okay. Did she tell you that?

21 A. No, I don't ever remember her saying that to me.

22 Q. Okay. If you had known that information, is that
23 something you would have reported up to Dr., I mean, to Daniel
24 Herrick?

25 A. You're asking me to speculate on something that is so far

1 out of my realm. That would have been something that Leslie
2 would have really been actively managing.

3 Q. Okay. So because you're on the operations side,
4 incompetent doctors doesn't come into your realm as the
5 practice director?

6 A. That's not what I said. I said whether or not I would
7 have reported that up feels like that's just not something that
8 I was aware of and that would have been what Leslie would have
9 been managing, not that I wouldn't have cared about that.

10 Q. Fair. My understanding of the process that the
11 operational group brought to the division was that it was about
12 better process; is that right?

13 A. Can you repeat that, please?

14 Q. Sure. The lean sigma six, did I get that right?

15 A. Lean Six Sigma.

16 Q. I'm dyslexic, so please forgive me. I do that all the
17 time.

18 So that system, was that bringing better process to the,
19 the different divisions?

20 A. Yes, the goal was to bring it in and help streamline that
21 and have consistency and reduce the variation in how the nurses
22 and the providers were interacting with each other and with the
23 patients.

24 Q. Great. And I heard from Daniel Herrick. I understood it
25 to be quality, safety, and flow. Is that about right?

1 A. Yeah.

2 Q. Okay. So, if there were safety issues, doesn't that
3 somewhat fall into your operational side or figure into your
4 operational equation as you're looking at this situation?

5 A. Yeah, certainly, that's something that I looked at.

6 Q. Okay. I'd like to explore with you a little bit about
7 what you knew what was going on with Dr. Hsu.

8 ATTORNEY McDONALD: Objection, outside the scope.

9 THE COURT: So I'll ask you to approach.

10 (Bench conference begins.)

11 THE COURT: Okay. So scope is not the only
12 consideration on cross. So what is the purpose, just so I can
13 better address this objection?

14 ATTORNEY NUNAN: Sure. She was aware of all of the
15 different safety issues going on in the department at that
16 time, and it's my opinion that she should have been reporting
17 that up to Daniel Herrick.

18 THE COURT: Is what it is? Okay. So what does that
19 go to? What are you trying to prove with that?

20 ATTORNEY NUNAN: Just that that was --

21 THE COURT: A lack of action?

22 ATTORNEY NUNAN: A lack of action on the
23 administrative side.

24 THE COURT: To make what larger point?

25 ATTORNEY NUNAN: That there was an administrative

1 awareness of the incompetence of the doctors in that division
2 at the time in 2016, the summer of 2016.

3 ATTORNEY McDONALD: She's testified that she didn't
4 report this up to Mr. Herrick, so I'm not sure how this could
5 possibly be demonstrating that it was larger administrative
6 awareness of this issue.

7 THE COURT: Did she already answer a question about
8 whether she knows anything about Dr. Hsu? I can't recall if
9 you asked that question.

10 ATTORNEY NUNAN: I'm not sure if I asked that
11 question. I know that in her deposition she testified to all
12 of the things that she heard from billing to OR, incompetence,
13 all of that.

14 THE COURT: Okay.

15 ATTORNEY NUNAN: Patient problems, everything, she
16 was aware of everything.

17 THE COURT: Okay. And how much do you have on this
18 topic? How deeply did you intend to get into Dr. Hsu?

19 ATTORNEY NUNAN: I intend to just hit on each one of
20 those topics to lay it out that she was aware of that and it
21 didn't get reported up.

22 THE COURT: Okay. So I'll let you ask some questions
23 on this. I don't think it should be something that you spend a
24 lot of time on.

25 ATTORNEY NUNAN: I'll hustle through it. Great,

1 thank you.

2 (Bench conference ends.)

3 BY ATTORNEY NUNAN:

4 Q. You were in the department when Dr. Porter did a six-month
5 mentorship with Dr. Hsu, right?

6 A. When he first started?

7 Q. Yes.

8 A. Yes.

9 Q. Okay, great. And Dr. Porter let you know or told you at
10 some point that he lacked clinical skills?

11 A. That's what she said, yes.

12 Q. Okay. You were aware that Dr. Hsu was not able to
13 complete his charts on time?

14 A. Yes.

15 Q. And you found that very aggravating?

16 A. Yes, I did.

17 Q. Yeah. You were aware that Dr. Hsu's pregnancy rates were
18 fairly low?

19 A. I don't remember the rates. I remember they were lower
20 than Dr. Porter's.

21 Q. Dr. Porter said to you at some point that she was very
22 concerned about Dr. Hsu's level of knowledge?

23 A. Probably.

24 Q. And were you aware that Dr. Porter was concerned about
25 Dr. Hsu's approach to making plans for patients?

1 A. I was aware of that, and all of these things I recommended
2 she go talk to Leslie as the clinical chair who could address
3 them better than I.

4 Q. Great. Did you ever take any of these concerns over to
5 quality or risk management?

6 A. I don't remember.

7 Q. Was that within your scope in the operational sphere?

8 A. To take them where?

9 Q. If you heard something of concern, was it your obligation
10 to report it to quality or risk management?

11 A. It depended, and if I heard specifics, and often, if it
12 was coming second or thirdhand to me, then it would be my role
13 to encourage the other person to call. So there are some
14 circumstances where that would be true, but I wouldn't do that
15 without a lot of information.

16 Q. Okay. Did Dr. Porter talk to you at some point that she
17 was concerned that Dr. Hsu was going to miss something with a
18 patient?

19 A. I don't remember.

20 Q. Okay. And did you understand that Dr. Porter had concerns
21 about Dr. Hsu's skill in the OR?

22 A. Yes, I remember that.

23 Q. And you were aware that Dr. Hsu performed a procedure
24 without consent?

25 A. I don't remember that.

1 Q. Do you remember going and talking to Janice Gonyea?

2 A. I don't remember her name.

3 Q. Okay. She was an ultrasound tech that you went down to
4 the --

5 A. It's ringing a bell, yes. Thank you. I remember talking
6 to that tech, yes.

7 Q. Okay. And did you find that -- I believe you said very,
8 you were very alarmed by that situation?

9 A. Yeah, I don't remember the details of this anymore, but I
10 remember that situation being very complicated.

11 Q. Do you remember talking to Dr. DeMars about it?

12 A. Yes, I'm sure I did.

13 Q. Okay. And do you remember that your belief was Dr. DeMars
14 went to risk management?

15 A. I don't remember, but that would have been the appropriate
16 step.

17 Q. Okay. And did you have discussions, or did other OB/GYN
18 generalists talk to you about their concerns about Dr. Hsu?

19 A. In generalities, yes. No one ever came directly to me to
20 talk about that, but I knew that that was something people had
21 gone to Dr. DeMars about.

22 Q. Okay. And none of this happened in a one-month period;
23 this, all of these things happened over quite a long period of
24 time?

25 A. Yes. It wouldn't have been a one-month period. Yeah.

1 Q. Did you ever have a discussion with any of the things we
2 just talked about with Daniel Herrick?

3 A. I don't remember discussing this with Daniel Herrick.

4 Q. Okay. I would briefly like to turn to your knowledge of
5 Dr. Seifer. We talked about him before. Just a few questions.

6 In the summer that Dr. Porter returned on a limited basis
7 with her long-term disability, were you aware that Dr. Seifer
8 was violating Dr. Porter's accommodations?

9 A. I became aware of that and addressed it with him multiple
10 times.

11 Q. Multiple times, yeah. And did Dr. Porter tell you that
12 she thought David Seifer was clinically incompetent?

13 A. I don't remember her using those words. I do remember her
14 complaining about his technique and, again, directing her to
15 Dr. DeMars.

16 Q. Got it. Do you have any medical training?

17 A. No.

18 Q. Okay. Did you remember hearing from multiple people that
19 David Seifer was causing excessive pain and there was more
20 blood with his egg harvests?

21 A. From multiple people? No. I remember hearing that they
22 were talking to each other about it and that there was probably
23 that large concern, but I did not have multiple people come to
24 me about that.

25 Q. Was the "they" the nurses?

1 A. Yes.

2 Q. Casey Dodge?

3 A. Yes.

4 Q. She was concerned?

5 A. I don't remember the details. I remember this being a
6 concern, and all of those people spoke to Dr. DeMars.

7 Q. Got it. And do you remember that there were complaints
8 about Dr. Seifer ordering all sorts of lab and blood work that
9 was considered excessive?

10 A. So I remember that as an offhand sort of flippant remark
11 while there were a lot of other complaints about him, so I
12 remember that as part of, like, longer venting that I would
13 hear from people.

14 Q. So you bring up venting. Is it, is venting the same word
15 as people not getting along in your mind? You used that quite
16 a bit in your deposition. I want to make sure I understand
17 your use of the word "venting".

18 A. What do you mean?

19 Q. So, when say somebody came and vented to you, what do you
20 mean by that?

21 A. I mean someone talking to me one-on-one and complaining
22 about their colleagues.

23 Q. Got it. Is there a difference in your mind between
24 venting and reporting incidents?

25 A. Yes.

1 Q. Okay. And do you feel like anybody coming to you with the
2 things from Seifer and Hsu, they were reporting incidents to
3 you?

4 A. Can you say that again?

5 Q. Sure. When they, when we've just gone through what you
6 heard from Dr. Porter, maybe from other generalists, from the
7 nurses. Could you distinguish between venting and them
8 reporting what they felt were incidents to you?

9 A. Yes. It was often very mixed up, right? So there were
10 some times very clearly where someone would come in and it was
11 clear they were reporting, and that is one thing. There was
12 also times were, in the hallway or as part of a larger
13 conversation about things happening, there was just a lot of
14 venting and complaining about personalities or style or
15 whatever.

16 Q. Do you think you have the medical training to identify
17 when somebody is reporting something that is maybe outside the
18 scope of practice?

19 ATTORNEY McDONALD: Objection, asked and answered.

20 THE COURT: Sustained.

21 BY ATTORNEY NUNAN:

22 Q. Okay, okay. I am going to either put on the ELMO or ask
23 you guys to put up 50A. Happy to put it on the ELMO.

24 ATTORNEY SCHROEDER: We can try.

25 ATTORNEY McDONALD: Sorry. What was the number?

1 BY ATTORNEY NUNAN:

2 Q. 50A which I believe is already admitted. Will you please
3 take a look at this email for me?

4 A. Okay.

5 Q. Okay. I might hand you -- I'll go up. Might actually
6 look at the whole thing, so just so you can know what I'm
7 talking about.

8 A. Great, thank you. Okay.

9 Q. Okay. This is an email you received from Daniel Herrick?

10 A. Yes.

11 Q. April 21st 2017?

12 A. Yes.

13 Q. And it's the subject line is "Updated File", right?

14 A. Yes.

15 Q. And the attachment is "REI program strategy"?

16 A. That's correct.

17 Q. Okay. And Leslie DeMars is not on this email, correct?

18 A. That's correct.

19 Q. Okay. Do you remember this being a document, the
20 attachment being a document that was passed back and forth
21 during this timeframe from about April 18th and the division
22 closure was decided through the next week or so?

23 A. Yes. I have a vague recollection of that, yes.

24 Q. That's fair. Can you turn to the last page? And the
25 title is called "Staffing Plan", correct?

1 A. Yes.

2 Q. Okay. And it has the current staff on the left-hand side?

3 A. Yes.

4 Q. And it has Dr. Porter as .4 GYN, ultrasound/REI?

5 A. Yes.

6 Q. Okay. And then Dr. Seifer, Dr. Hsu. Nurse practitioner
7 Elizabeth Todd, she's GYN/REI. Marti Lewis, Marlene Grossman,
8 and then a vacant position, right?

9 A. That's correct.

10 Q. Okay. And then the lab staff below. And on the
11 right-hand side you have, "Future staff with complete REI
12 shutdown". And in that scenario there on April 27th, you have
13 Dr. Porter being in .4 of GYN ultrasound, correct?

14 A. That's correct.

15 Q. So the same amount of time that she's in the current staff
16 but just in ultrasound, not REI?

17 A. That's correct.

18 Q. Okay. And you have Elizabeth Todd listed to go over to
19 REI in the generalist division, correct?

20 A. Correct.

21 Q. Okay. And after the REI was closed, Elizabeth Todd was
22 reassigned to the generalist division, wasn't she?

23 A. The rest of her FTE was reassigned there. That's correct.

24 Q. And Dr. Porter was terminated?

25 A. That's correct.

1 ATTORNEY NUNAN: Okay. Give me just a second,
2 please.

3 THE COURT: Yes.

4 ATTORNEY NUNAN: I have no further questions.

5 THE COURT: Okay. Redirect?

6 ATTORNEY McDONALD: Yes, just briefly.

7 THE COURT: Okay.

8 REDIRECT EXAMINATION BY ATTORNEY McDONALD

9 Q. Ms. Gunnell, I'll ask you to keep 50A in front of you if
10 you wouldn't mind, and, looking at the same page that you were
11 just looking at, the very last page. Actually, to begin with,
12 if I could ask you to take a look at the first page, I believe
13 Ms. Nunan said this was dated April 27th. Can you read the
14 date at the top of that?

15 A. April 21st 2017.

16 Q. Thank you. Now, returning to that last page, do you have
17 a sense of what department GYN US falls under?

18 A. GYN ultrasound, that is radiology.

19 Q. And radiology is separate from the OB/GYN department,
20 correct?

21 A. That is correct.

22 Q. Did you come up with the idea to include Dr. Porter in the
23 side of the chart of future staff?

24 A. These projections were largely based on what Dr. DeMars
25 wanted to build out and was talking to me about. So I would

1 back it up with this information.

2 Q. So is it fair to say that it was Dr. DeMars's suggestion
3 to include her?

4 A. That's correct.

5 Q. Okay. And then, backing up a little bit, if Sharon Parent
6 had been allowed to return after her retirement on a per diem
7 basis, from your perspective, would that have solved the
8 nursing crisis in the REI division?

9 A. Solved the crisis? Absolutely not.

10 Q. Why do you say that?

11 A. Because it would have only been per diem, and we were down
12 so many nurses that it just wouldn't have been able to maintain
13 the volume. It could have been useful had we been able to
14 recruit. She would have been great training people, but this
15 certainly would not have solved the crisis. We still would
16 have only had one full-time RN who was not completely trained.

17 ATTORNEY NUNAN: All right. Thank you so much.
18 Nothing further.

19 THE COURT: Any recross?

20 ATTORNEY NUNAN: Nothing further.

21 THE COURT: Okay. You may step down, Ms. Gunnell.
22 Okay. And I think there are no further witnesses for today,
23 right?

24 ATTORNEY SCHROEDER: No, Your Honor. Hopefully, the
25 one who had a flight delay will be here.

1 THE COURT: Okay. So that concludes the trial day
2 for today. Please, as always, don't speak to one another or
3 anyone else about the case or do any research on your own about
4 the case. Have a good evening.

5 (The Jury leaves the courtroom.)

6 THE COURT: Okay. So one witness for tomorrow for
7 the defense?

8 ATTORNEY SCHROEDER: We have two, Your Honor. It
9 will be Dr. Maria Padin and Dr. Jocelyn Chertoff. I expect us
10 to be done in and around the morning break.

11 THE COURT: Okay.

12 ATTORNEY SCHROEDER: Maybe I'm a little overzealous
13 in that estimation, but certainly by lunch.

14 THE COURT: Okay, all right. Thank you.

15 ATTORNEY SCHROEDER: And then we will, we will be
16 done with our case in chief.

17 THE COURT: Okay. And, plaintiff, do you know how
18 many witnesses, if any, if you're going to have rebuttal?

19 ATTORNEY JONES: Two.

20 THE COURT: Two? Okay.

21 ATTORNEY SCHROEDER: Can we have their names?

22 THE COURT: Could you?

23 ATTORNEY JONES: Yeah. Eunice Lee and Dr. Porter.

24 THE COURT: Okay, okay. Anything else to take up at
25 this time?

1 ATTORNEY SCHROEDER: No, Your Honor. Well, one thing
2 Your Honor. We did submit, and I think, I believe we filed the
3 supplemental jury instructions to, and I assume, I assume, if
4 we have time tomorrow afternoon, we'll get ready for, I guess,
5 the charge conference for Monday?

6 THE COURT: Yeah. So my, at this point, I was
7 thinking I will be able to provide you instructions first thing
8 Monday morning, and then we could have the conference that I
9 anticipate having it that afternoon --

10 ATTORNEY SCHROEDER: Understood.

11 THE COURT: -- on Monday because you'll be closing
12 Tuesday, and, if we are finished tomorrow, then Monday would be
13 an off day for the jury, anyway, if that makes, if that works
14 for everyone.

15 ATTORNEY SCHROEDER: Works for the defendants, Your
16 Honor.

17 THE COURT: Okay. So, yeah, you should be able to
18 either access the jury instructions. I haven't decided yet
19 whether I'll post them in ECF and you can get them that way,
20 or, if not, we'll have them available for you here first thing
21 Monday morning, and then we can, maybe tomorrow we can talk
22 about setting a specific time on Monday for the actual charge
23 conference. I was thinking sometime kind of early to
24 midafternoon. Okay?

25 ATTORNEY SCHROEDER: Very acceptable. Thank you.

1 THE COURT: All right. Plaintiff, anything?

2 ATTORNEY JONES: Nothing.

3 ATTORNEY VITT: Nothing.

4 THE COURT: Okay. Have a good evening.

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6 (Whereupon at 4:13 p.m. the hearing was adjourned.)

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C E R T I F I C A T E

1 I, Sunnie Donath, RMR, Official Court Reporter
2 for the United States District Court, District of Vermont, do
3 hereby certify that the foregoing pages are a true and accurate
4 transcription of my stenographic notes of the hearing taken
5 before me in the above-titled matter on April 3, 2025 to the
6 best of my skill and ability.

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Sunnie Donath, RMR

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Sunnie Donath, RMR

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